TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 247.

JOHN R. HOLLOWAY, PLAINTIFF IN ERROR,

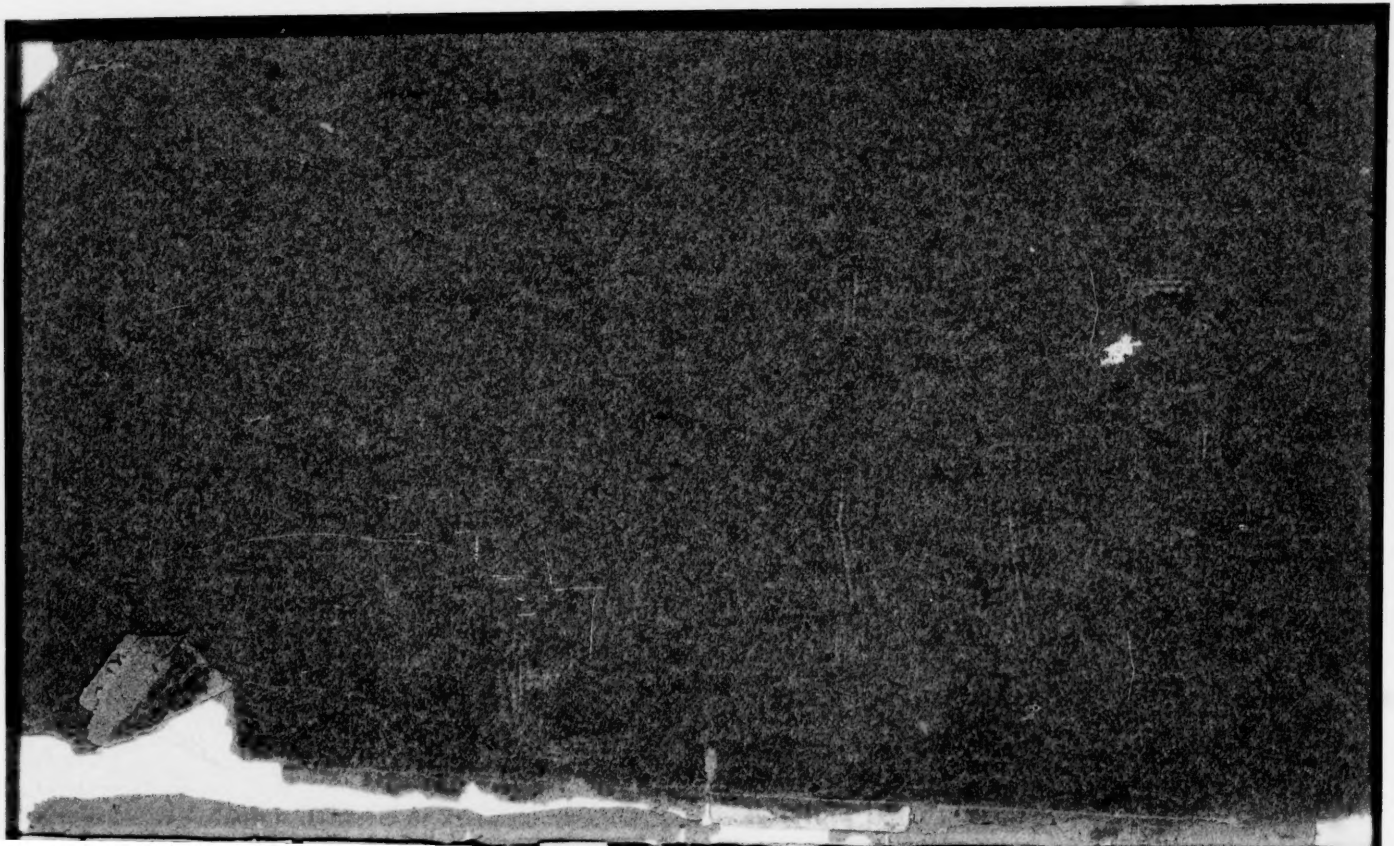
vs.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB, AND WILLIAM K. WEBB.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED OCTOBER 16, 1908.

(16,407.)



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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a Be it remembered that on the —- day of ——, 1896, the plaintiff in error, John R. Holloway, filed in the court aforesaid a petition for a writ of error; which said petition is in words and figures as follows, to wit:

In the Supreme Court of the Territory of Oklahoma.

JOHN R. HOLLOWAY, Plaintiff in Error, *vs.* JAMES H. DUNHAM, WILLIAM T. BUCKLEY, Charles Webb, and William E. Webb, Defendants in Error.	At Law. Petition for Writ of Error.

And now comes John R. Holloway, plaintiff in error herein, and says that on or about the 17th day of January, 1896, this court entered judgement herein in favor of the defendants in error and against the plaintiff in error, in which judgement and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff in error; all of which will more in detail appear from the assignment of erro-s which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error
b may issue in this behalf to the supreme court of the Territory of Oklahoma for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

(Signed) AMOS GREEN & SON,
Att'ys for Plaintiff in Error.

That there was filed with said petition for writ of error an assignment of erro-s, which is in words and figures as follows:

In the Supr-me Court of the Territory of Oklahoma, *ss:*

JOHN R. HOLLOWAY, Plaintiff in Error, *vs.* JAMES H. DUNHAM, WILLIAM E. BUCKLEY, Charles Webb, and William E. Webb, Defendants in Error.	At Law. Assignment of Errors.

The plaintiff in error in this action, John R. Holloway, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

First. The court erred in holding, after finding that the in-
c struction as to what constituted residence within the meaning of the attachment laws of the Territory of Oklahoma, numbered eight and eleven, were erroneous, that it was harmless error by reason of the fact that there was an allegation of fraudulent dis-

position of property in the affidavit of attachment, and that this was sufficient to support the judgement of the court.

Second. The court erred in holding that it was not an abuse of judicial discretion for the court below to submit special findings to the jury with reference to fraudulent disposition of property, there being no evidence of such fraudulent disposition of property offered on the trial of the case below and none contained in the record.

Third. The court erred in holding and affirming the judgement of the court below after finding that the following instruction, numbered 12, to wit, "You need not be unanimous in determining what your verdict shall be; nine of you can determine upon a verdict," was not reversible error, for the reason that it did not appear from the record that only nine of the jurors found a verdict, and the court was given no opportunity by motion for a new trial to correct this ruling, and that therefore it was harmeless error.

Fourth. The court erred in affirming the opinion of the lower court giving judgement for more than asked for in the complaint of defendants in error.

Wherefore, for the many errors aforesaid, the plaintiff in error asks that this case be reversed, that the errors therein may be corrected.

(Signed) C. A. LELAND AND
AMOS GREEN & SON,
Att'ys for Plaintiff in Error.

d Be it further known that an order allowing said writ of error, as prayed for, was duly made, and is in words and figures as fol-ows:

In the Supreme Court of the Territory of Oklahoma, *ss:*

JOHN R. HOLLOWAY, Plaintiff in Error,
vs.
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, Charles Webb, and William E. Webb, Defendants in Error.
} Order Allowing Writ of Error.

This 9th day of October, 1896, came the plaintiff in error, by his attorney, and filed herein and presented to the court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and papers upon which the judgement herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other proceedings may be had as may be proper in the premises; on consideration whereof the court does allow the writ of error, plaintiff in error having given bond in the sum of fifteen thousand dollars, duly approved, as required by law, and which shall act as a supersedeas bond.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory — Oklahoma.

e UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the Territory of Oklahoma, Greeting:

Because in the records and proceedings, as also in the rendition of the judgement of a plea which is in said supreme court of the Territory of Oklahoma, before you, being the highest court of said Territory in which a decision could be had in said suit between John R. Holloway, plaintiff in error, and James H. Dunham, Wil-iam T. Buckley, Charles Webb, and Wil-iam E. Webb, defendants in error, wherein the amount in controversy exceeded the sum of five thousand dollars, and manifect error having happened, to the great damage of the said plaintiff in error, John R. Holloway, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 9th day of November, 1896, in said Supreme Court, to be then and there held, that,

f the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Supreme Court, Territory of Oklahoma.

Witness the Hon. Melville W. Fuller, Chief Justice of said Supreme Court, the 9th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Allowed by—
FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest: EDGAR W. JONES,
Clerk Supreme Court,
By OLGA SCRUTCHFIELD, *Deputy.*

g In the Supreme Court of the Territory of Oklahoma.

JOHN R. HOLLOWAY, Plaintiff in Error,
vs.
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB, and WILLIAM E. WEBB, Defendants in Error.

Writ of error filed in court the 9th day of October, 1896.

UNITED STATES OF AMERICA, *Territory of Oklahoma,* } *ss:*

Be it remembered that the above and foregoing writ of error was deposited in the office of the clerk of the supreme court of the Ter-

ritory of Oklahoma, sitting at Guthrie, in said Territory, on the 9th day of October, 1896, and, in pursuance to such writ of error and in obedience to the command thereof, I, the undersigned, Edgar W. Jones, clerk of said court, do hereby return that there was rendered in said court the judgement mentioned in said writ of error, and I do herewith return unto the clerk's office of the Supreme Court of the United States, at Washington, in the District of Columbia, in pursuance to the commands of said writ, a full, true, and
h complete transcript of the record in said case; and I do further certify that the following pages, numbered from one to two hundred and one, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the cause therein entitled John R. Holloway, plaintiff in error, *vs.* James H. Dunham, William T. Buckley, Charles H. Webb, defendants in error, as the same remain of record and on file in my office.

Seal Supreme Court, Territory of Oklahoma.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at Guthrie, in the Territory of Oklahoma, on this 9th day of October, 1896.

EDGAR W. JONES, *Clerk*,
By OLGA SCRUTCHFIELD, *Deputy*.

i *Citation to Defendant in Error.*

THE UNITED STATES OF AMERICA, *ss*:

To James H. Dunham, William E. Buckley, Charles Webb, and William E. Webb, Greeting:

You are hereby cited and admonished to be and appear at the *a* Supreme Court of the United States, to be holden at the city of Washington, on the 9th day of November, 1896 next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein John R. Holloway is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgement rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand, at the city of Guthrie, in the year of our Lord one thousand — and ninety-six.

FRANK DALE,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Seal Supreme Court, Territory of Oklahoma.]

Attest: EDGAR W. JONES,
Clerk Supreme Court,
By OLGA SCRUTCHFIELD, *Deputy*.

Service of the within citation accepted this 9th day of October, 1896.

DOUGLAS & DOUGLAS,
Att'ys for J. H. Dunham, Wm. E. Buckley, Chas. Webb, and Wm. E. Webb.

1 TERRITORY OF OKLAHOMA, } *ss:*
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant. } Complaint.

Comes now the above-named plaintiffs and represent that on November 1st, 1890, prior and subsequent thereto and continuously thereafter, they were and now are a partnership, doing a general wholesale mercantile business at New York city, in the State of New York, under the style and firm name of Dunham, Buckley & Co.; that on said November 1st, 1890, and continuously thereafter until after March 10, 1891, the said defendant was engaged in a general retail mercantile business at Fort Worth, in the State of Texas, and is at present so engaged at Oklahoma city, said Oklahoma county and Territory of Oklahoma, under the style and firm name of J. R. Holloway & Co.; and complain of the said defendant, and for cause of action against him allege and say:

That on divers days between said November 1st and March 10 they, the plaintiffs, sold and delivered to him, the defendant, at his special instance and request, certain goods, chattels, and merchandise at certain prices, aggregating certain sums, of the total amount of five thousand six hundred and seventy-eight and $\frac{78}{100}$ dollars ($5,678.78); that thereafter the defendant paid of said total sum seventy-two and $\frac{71}{100}$ dollars ($72.71), and also, on, to wit, April 22, 1891, paid of said total amount the further sum of six hundred and one and $\frac{49}{100}$ dollars ($601.49), leaving on the last said date
2 of said total amount a balance of five thousand and four and $\frac{58}{100}$ dollars ($5,004.58) unpaid; all of which will more fully appear by an itemized account of the same hereto attached, marked "Exhibit A," and made a part hereof.

The plaintiffs further allege and say that for said goods so sold and delivered to the defendant he undertook, contracted, and promised to pay said sum; that the same long since became and now is due and payable, and no part thereof, except as above set forth, has been paid by the defendant, or any one for him or on his behalf, to the plaintiffs or either of them or any one authorized to receive such payment, although demand for the same has often been made.

Wherefore the plaintiffs pray judgment for said sum of five thousand and four and $\frac{58}{100}$ dollars ($5,004.58), with interest thereon, according as the same may appear to be due from the items of said exhibit, at the rate of seven per cent. per annum, and for costs of suit.

JAMES H. DUNHAM,
WILLIAM T. BUCKLEY,
CHARLES H. WEBB, AND
WILLIAM T. WEBB, *Plaintiffs,*
By STANLEY AND JOHNSON & HOWARD,
Their Attorneys.

3 EXHIBIT A.

Folio 17953.
Salesman, Dutcher.

NEW YORK, *Oct. 6th*, 1891.

Messrs. J. R. Holloway & Co., Fort Worth, Texas, now at Oklahoma City, O. T., to Dunham, Buckley & Co., Nos. 340, 342, & 344 Broadway, Dr.

1890.		To mdse.:						
Nov.	1.	To mdse. as	Dec.	31.....	60 ds.	100 33		
"	6.	"	Jan.	6.....	"	14 03		
								114 36
Aug.	28.	" as	Nov.	1.....	4 mos.	390 85		
"	29.	"	"	.....	"	597 76		
"	"	"	"	.....	"	625 39		
"	30.	"	"	.....	"	45 35		
Sep.	1.	"	"	.....	"	481 79		
"	3.	"	"	3.....	"	273 13		
"	"	"	"	.....	"	1 13		
"	"	"	"	.....	"	358 14		
"	"	"	"	.....	"	31 75		
"	4.	"	"	4.....	"	260 20		
"	3.	"	"	3.....	"	1,472 37		
"	8.	"	"	8.....	"	5 25		
"	23.	"	"	23.....	"	68 00		
Oct.	20.	"	Dec.	20.....	"	42 51		
"	24.	"	"	24.....	"	41 65		
"	27.	"	"	27.....	"	45 00		
"	31.	"	"	31.....	"	59 16		
Nov.	1.	"	"	31.....	"	39 57		
"	3.	"	Jan.	3.....	"	15 00		
"	7.	"	"	7..	"	15 75		
"	"	"	"	.....	"	46 00		
"	11.	"	"	11	"	10 05		
"	"	"	"	.....	"	55 25		
"	25.	"	"	25.....	"	24 13		
"	"	"	"	.....	"	31 45		
"	26.	"	"	26.....	"	3 22		
Dec.	9.	"	Feb.	9.....	"	9 06		
"	10.	"	"	10.....	"	44 92		
"	15.	"	"	15... ...	"	12 05		
"	31.	"	M'ch	1.....	"	5 00		
1891.								
Jan.	30.	"	"	30.....	"	60 02		
M'ch	7.	"	May	6.....	"	393 52		
							5,564	42

Cr. by mdse	15 36		
" "	24 00		
" "	23 00		
" "	12 00		
	74 36		
Less charges	1 65		
		72 71	
			5,491 71
			5,606 07
Due M'ch 23, '91.			
4			
Cr. f'rd			5,606 07
1891.			
Apr. 22. Cr. by cash			601 49
			5,004 58
Interest to Oct. 25, '91			183 18
			5,187 76

TERRITORY OF OKLAHOMA, }
Oklahoma County. }

J. H. Bradley, being duly sworn, says on his oath that he is the agent of Dunham, Buckley & Co.; that the above account is a full, true, and correct one; that, including interest, there is due and unpaid from the said J. R. Holloway to said Dunham, Buckley & Co. the said sum of $5,187.76, after allowing all just credits, counterclaims, and srt-offs, and that he believes they, the said Dunham, Buckley & Co., ought to recover said sum.

J. H. BRADLEY.

Subscribed and sworn to before me this 31st day of October, 1891.

[SEAL.] WILL H. CLARK, *Clerk*,
By GEORGE H. LAING, *Deputy*.

TERRITORY OF OKLAHOMA, }
Oklahoma County, } *ss:*

H. H. Howard, being duly sworn, upon his oath says he is one of the attorneys of the plaintiffs in the above-entitled cause, knows the contents of the foregoing complaint, and believes the same to be true.

H. H. HOWARD.

Subscribed in my presence and sworn to before me this 31st day of October, 1891.

[SEAL.] WILL H. CLARK, *Clerk*,
By GEORGE H. LAING, *Deputy*.

The plaintiffs in the above and foregoing cause being non-residents of the said Territory of Oklahoma, I hereby enter myself as security for all costs that may accrue in said action.

H. H. HOWARD.

Dated this 31st day of October, 1891.

5 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, Charles H. Webb, and William E. Webb, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Affidavit for Attachment.

J. H. Bradley, being duly sworn, upon his oath says that he is the agent of the plaintiffs in the above-entitled cause and makes this affidavit upon their behalf; that the said plaintiffs have commenced an action in said court against the said defendant, J. R. Holloway, to recover the sum of five thousand and four and $\frac{58}{100}$ dollars ($5,004.58), interest thereon in the sum of one hundred and eighty-three and $\frac{18}{100}$ dollars ($183.18), and costs of suit, which is now due and payable to the said plaintiffs from the said defendant.

Affiant further says that the said claim is just, and said plaintiffs ought, as affiant believes, to recover there the said sum of five thousand and four and $\frac{58}{100}$ dollars ($5,004.58), and the sum of one hundred and eighty-three and $\frac{18}{100}$ dollars ($183.18) as interest thereon; that said sum is due for goods and merchandise sold and delivered to the defendant by the plaintiffs at various times between November 1st, 1890, and March 10, 1891, and that the said defendant, J. R. Holloway, is about to sell, convey, and otherwise dispose of his property subject to execution with the fraudulent intent to cheat and hinder and delay his creditors, and that said J. R. Holloway is a non-resident of said Territory of Oklahoma.

J. H. BRADLEY.

Subscribed in my presence and sworn to before me this 31st day of October, 1891.

[SEAL.]

WILL H. CLARK,
Clerk of the District Court,
By GEORGE H. LAING, *Deputy.*

6 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Undertaking in Attachment.

We, L. A. Gilbert and James Geary, hereby undertake to the said J. R. Holloway in the penal sum of ten thousand four hundred dollars ($10,400.00) that the plaintiffs, James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, will duly prosecute their proceedings in attachment in the above-entitled cause, and will pay all damages which he, the said defendant, may sustain if said proceedings of the plaintiffs shall be wrongful and oppressive.

L. A. GILBERT.
JAMES GEARY.

Dated this 31st day of October, 1891.

Approved by me this 31st day of October, 1891.

WILL H. CLARK,
Clerk of the District Court,
[SEAL.] By GEORGE H. LAING, *Deputy.*

(Endorsements on back of complaint, affidavit in attachment, and undertaking in attachment as follows, to wit:)

"No. 333. 3–101. In the district court, Oklahoma county. James H. Dunham *et al. vs.* J. R. Holloway. Complaint, etc. The plaintiffs hereby designate Monday, Nov. 23, 1891, as the day upon which the defendant shall be required to appear and answer to this complaint. Oct. 31, 1891. James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, plaintiffs, by Johnson & Howard, their attorneys. Filed Oct. 31st, 1891. Will H. Clark, clerk, by George H. Laing, deputy. Stanley, Johnson & Howard, for plaintiffs."

7 And thereafter, on the 28th day of November, 1891, the following answer was filed, to wit:

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the District Court of the 3rd Judicial District within and for Oklahoma County, Oklahoma Territory.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Answer.

Comes now the defendant and for his answer to plaintiffs' complaint denies each and every allegation therein contained and de-

mands strict proof of same; and of this he puts himself upon the country.

J. R. HOLLOWAY,
By WILLIAMS, ARMSTRONG & TURNER,
Att'ys for Defendant.

W. S. Holloway, being duly sworn, says that he is the agent of the above-named defendant, and that the facts stated in the foregoing answer are true.

W. S. HOLLOWAY.

Subscribed and sworn to before me the 27 Nov., 1891.
[SEAL.] WILL L. BRADFORD,
County Clerk.

Subscribed and sworn to before me this 27th day of Nov., 1891.
[SEAL.] S. A. STEWARD,
Probate Judge.

(Endorsements on the back of said answer:)
"333. 3–100. J. H. Dunham *et al. vs.* J. R. Holloway. Answer. Filed Nov. 28, 1891. Will H. Clark, clerk."

8 And thereafter, on the 23rd day of November, 1891, the following bond for costs was filed, to wit:

Know all men by these presents that we, James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, as principal-, and L. A. Gilbert and H. H. Howard, residents of Oklahoma county, Oklahoma Territory, as surety, are held and firmly bound unto the clerk of the district court in the penal sum of two hundred and fifty dollars; for the payment of which, well and truly to be made, we do hereby bond ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Signed and dated this 23rd day of November, A. D. 1891.

Whereas, on the 31st day of October, A. D. 1891, James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb did commence an action in the district court of Oklahoma county, Territory of Oklahoma, held within and for the said county of Oklahoma, wherein the said James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb are plaintiffs and J. R. Holloway & Co. is defendant, to recover of the said defendant the sum of five thousand four and $\frac{58}{100}$ dollars, with interest thereon:

Now, therefore, the condition of this obligation is such that if the above-bounden James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, plaintiffs, shall pay or cause to be paid all costs that may be adjudged against them, and to pay the same provided they cannot be collected of the defendant in the above-named court or any court to which said action may be car-

ried, then this obligation to be void; otherwise to be and remain in full force and effect.

JAMES H. DUNHAM,
WILLIAM T. BUCKLEY,
CHARLES H. WEBB,
WILLIAM E. WEBB,
By JOHNSON & HOWARD,
Their Attorneys.
L. A. GILBERT.
H. H. HOWARD.

Signed in the presence of—
W. H. STEBBINS.

8½ (Endorsements on the back of said bond for costs:)
"Bond for costs. District court. The within bond and the sureties thereto approved this 23rd day of November, 1891. Will H. Clark, clerk. Filed in the third district court Nov. 23, 1891. Will H. Clark, clerk, Oklahoma county, Ok. Ter."

9 And thereafter, on the 16th day of June, 1892, the following judgment was filed, to wit:

In the District Court of the Third Judicial District of Oklahoma Territory within and for Oklahoma County.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Judgment.

Now, at this day, this cause coming on to be heard and the plaintiffs appearing, by their attorneys, Johnson, Travers & Howard, and the defendant appearing in his own proper person and by his attorneys, Leland & Armstrong, and the defendant requesting a jury, all and singular the issues herein made by the plaintiffs' complaint and affidavit for attachment and defendant's answer, traversing and denying all and singular the matters alleged in plaintiffs' said complaint and affidavit for attachment, are submitted to a jury; and the jury, after hearing the evidence, the instructions of the court, and the argument of counsel, retire to consider of their verdicts, and, after considering of the same, return into the court the following verdicts:

"We, the jury, duly empaneled and sworn in the above case, find for the plaintiff- on the attachment issue.
EUGENE WALKER, *Foreman.*"

"We, the jury, duly empaneled and sworn in the above-entitled cause, find for the plaintiffs, and assess their damages at $5,434.61.
EUGENE WALKER, *Foreman.*"

And the court, at the instance of the defendant, having submitted in writing to the jury the following questions:

"Was J. R. Holloway on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with the intent to cheat, hinder, and delay his creditors?

"Was J. R. Holloway on the 31st day of October, 1891, a non-resident of Oklahoma Territory?"

The jury, at the time of rendering their verdict as aforesaid, returned as their special finding to each of said questions the answer, "Yes;" which said questions, with the answer "yes" thereto, were separately and severally signed "Eugene Walker, foreman."

10 Wherefore the court doth find, from the several verdicts and findings aforesaid, that the defendant is indebted to the plaintiffs in the sum of five thousand and four hundred and thirty-four dollars and sixty-one cents; that the defendant, J. R. Holloway, was on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with intent to cheat, hinder, or delay his creditors, and that the said J. R. Holloway was on the 31st day of October, 1891, a non-resident of the Territory of Oklahoma, and that plaintiffs are entitled to have the property attached herein sold for the satisfaction of this debt.

It is therefore ordered and adjudged by the court that the plaintiffs have and recover of and from the defendant the said sum of five thousand four hundred and thirty-four dollars and sixty-one cents, together with their costs in this behalf laid out and expended, and that execution issue therefor.

It is further considered and adjudged by the court that the attachment herein be sustained, and that the lien created by the levy of the writ of attachment herein be continued and maintained, and that the property attached in this action, to wit, a certain stock of goods and merchandise, consisting of dry goods, notions, furnishing goods, hats, caps, boots, shoes, and fixtures, found in the building situated on lots numbered 35 and 36, in block 22, north of the post-office in Oklahoma city, Oklahoma county, Oklahoma Territory, as the same is described in the sheriff's return to the writ of attachment herein, or so much thereof as may be necessary for that purpose, be sold, and that the proceeds of such sale be applied to the payment of plaintiff's claim and the costs herein, and if there be any overplus it be paid to defendant or his legal representatives.

JOHN G. CLARK, *Judge.*

Endorsements on the back of said judgment are as follows, to wit:

#333. J. H. Dunham *et al. vs.* J. R. Holloway. Judgment. Filed June 16, 1892. Will H. Clark, clerk, by Adah Curnutt, dep't. Costs, $99.90."

11 And thereafter, on the 7th day of November, 1891, the following answer was filed, to wit:

In the District Court of Oklahoma Territory in and for Oklahoma County, in the 3rd Judicial District.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY & Co., Defendants. } General Denial of Defendant.

Comes now the defendant and for his answer herein denies each and every material allegation contained in plaintiffs' petition and demands strict proof thereof, and of this he puts himself upon the country.

WILLIAMS, ARMSTRONG & TURNER,
Attorneys for Defendant.

J. R. Holloway, having been duly sworn, deposes and says he is the defendant in the above-entitled cause, and that his above answer is true.

J. R. HOLLOWAY.

Subscribed and sworn to before me this 5th day of November, 1891.

[SEAL.] S. A. STEWARD,
Notary Public.

(Endorsements:) No. 333. James H. Dunham *et al.*, plaintiff-, *vs.* J. R. Holloway & Co., defendant. Defendant's answer. General denial. Filed in the third district court Nov. 7, 1891. Will H. Clark, clerk, Oklahoma county, Oklahoma Territory. Williams, Armstrong & Turner, attorneys for defendant.

12 And thereafter, on the 7th day of November, 1891, the following answer was filed, to wit:

In the District Court of Oklahoma Territory in and for Oklahoma County, in the 3rd Judicial District.

JAMES H. DUNHAM *et al*, Plaintiffs,
vs.
J. R. HOLLOWAY & Co., Defendants. } No. —. General Denial of Defendant.

Comes now the defendant and for his answer herein denies each and every material allegation contained in plaintiffs' petition and demands strict proof thereof; and of this he puts himself upon the country.

WILLIAMS, ARMSTRONG & TURNER,
Attorneys for Defendant.

J. R. Holloway, having been duly sworn, deposes and says he is the defendant in the above-entitled cause, and that his above answer is true.

J. R. HOLLOWAY.

Subscribed and sworn to before me this 5th day of November, 1891.

S. A. ARMSTRONG,
[SEAL.] *Notary Public.*

(Endorsements:) 3–100. "No. 333. James H. Dunham *et al.*, plaintiff-, *vs.* J. R. Holloway & Co., defendants. Defendants' answer. General denial. Filed in the third district court Nov. 7, 1891. Will H. Clark, clerk, Oklahoma county, Oklahoma Territory. Williams, Armstrong & Turner, attorneys for defendants."

13 And thereafter, on the 23rd day of November, 1891, the following general denial was filed, to wit:

In the District Court of Oklahoma County in and for the 3rd Judicial District.

JAMES H. DUNHAM *et al.*, Plaintiff-,
vs.
J. R. HOLLOWAY, Defendant. } General Denial.

Comes now the defendant and for his answer to the plaintiffs' complaint denies each and every material allegation contained in plaintiffs' complaint and demands strict proof of same; and of this he puts himself upon the country.

J. R. HOLLOWAY.

(Endorsements:) 3–100. #333. J. H. Dunham *et al.*, plaintiff-, *vs.* J. R. Holloway, defendant. General denial. Filed November 23rd, 1891. Will H. Clark, clerk, by George H. Laing, deputy. Williams, Armstrong & Turner, attorneys for defendant.

14 And thereafter, on the 14th day of November, 1891, the following notice of motion to discharge attachment was filed, to wit:

In the District Court of Oklahoma Territory in and for Oklahoma County, in the 3rd Judicial District.

JAMES H. DUNHAM *et al.*, Plaintiff-,
vs.
J. R. HOLLOWAY, Defendant. } No. —. Notice of Motion to Discharge Attachment.

To Dunham, Buckley, *et al.*, plaintiffs, or Johnson & Horard, plaintiffs' attorneys of record:

You are hereby notified that on the 14th day of November, 1891, at ten o'clock a. m., or as soon thereafter as a hearing can be had, we will apply to the Hon. John G. Clark, judge of said district court, at Oklahoma county, for an order to discharge the attachment heretofore issued in an action pending in said court in the above-entitled cause from the whole of said property attached.

You are also notified that at the same time and place we will file affidavits to disprove the allegations in the affidavit filed by you to obtain said order of attachment.

J. R. HOLLOWAY,
By WILLIAMS, ARMSTRONG & TURNER,
His Attorneys.

Received copy of above notice this — day of Nov., 1891.
STANLEY, JOHNSON & HOWARD,
Plaintiffs' Attorneys.

(Endorsements on the back of said notice of motion to discharge attachment:)

"No. 333. 2–104. James H. Dunham *et al.*, plaintiffs, *vs.* J. H. Holloway & Co., defendants. Notice of motion to discharge attachment. Filed in the third district court Nov. 14, 1891. Will H. Clark, clerk Oklahoma county, Ok. Ter. Williams, Armstrong & Turner, attorneys for defendant."

15 And thereafter, on the 23rd day of November, the following answer in attachment proceedings was filed, to wit:

In the District Court of Oklahoma County in and for the 3rd Judicial District.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Defendant's Answer in Attachment Proceedings.

Comes now the defendant, J. R. Holloway, and for his answer in the attachment proceedings herein says:

1st. He denies each and every allegation in plaintiffs' affidavit for attachment.

2nd. That the grounds alleged in plaintiffs' affidavit for attachment are each and every one wholly untrue.

Wherefore the defendant demands judgment in the attachment proceedings.

J. R. HOLLOWAY.

J. R. Holloway, having been duly sworn, says he is the defendant in the above-entitled cause and knows the contents of the above answer in attachment, and says the statements therein made are true.

J. R. HOLLOWAY.

Subscribed and sworn to before me this the 22nd day of Nov., 1891.

[SEAL.] WILL L. BRADFORD,
County Clerk.

(Endorsements on the back of said answer in attachment proceedings:)

"333. 3–100. J. H. Dunham *et al.*, pl'ff-, *vs.* J. R. Holloway, defendant. Defendant's answer in attachment proceedings. Filed Nov. 23d, 1891. Will H. Clark, clerk, by George H. Laing, dept. Williams, Armstrong & Turner, attorneys for defendant."

16 And thereafter, on the 20th day of November, 1891, the following affidavit for security for costs was filed, to wit:

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Affidavit for Security for Costs.

J. R. Holloway, having been deuly sworn, deposes and says he is the defendant in this action and a resident citizen of Oklahoma Territory, and that the plaintiff is a non-resident of Oklahoma Territory.

Wherefore defendant moves the court to dismiss the above-entitled cause of action because the said plaintiff has not filed a cost bond, as required by law.

J. R. HOLLOWAY.

Subscribed and sworn to before me this the 20th day of November, 1891.

W. L. BRADFORD,
County Clerk,
[SEAL.] By W. H. THACKER, *Deputy*.

(Endorsements:) "No. 333. 3-100. J. H. Dunham *et al.*, plaintiff-, *vs.* J. R. Holloway, defendant. Affidavit for security for costs. Filed in the third district court November 20th, 1891. Will H. Clark, clerk Oklahoma county, Ok. Ter. Williams, Armstrong & Turner, attorneys for defendant."

17 And thereafter, on the 25th day of November, 1891, the following answer was filed, to wit:

TERRITORY OF OKLAHOMA,
Oklahoma County,
} *ss:*

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Comes now the defendant and for his answer to the plaintiffs' complaint denies each and every allegation contained in plaintiffs' complaint and demands strict proof of same; and of this he puts himself upon the country.

(Signed) W. S. HOLLOWAY.

Second. The defendant, J. R. Holloway, answering the complaint filed herein, denies that he undertook, contracted, or promised to pay the said sum alleged by plaintiff- in their complaint, and denies that the said goods and merchandise delivered to him by plaintiff-, as alleged in said complaint, were worth the sum of $5,004.58, as therein set forth.

(Signed) W. S. HOLLOWAY.

W. S. Holloway, being duly sworn, says he is the agent of the above-named defendant, and that the facts in the foregoing are true.

Subscribed and sworn to before me this 25th day of Nov., 1891.

S. A. STEWARD,
Probate Judge.

(Endorsements:) "3-100. No. 333. J. H. Dunham *et al.*, plaintiff, *vs.* J. R. Holloway, defendant. General denial. Answer of defendant. Filed November 25th, 1891, at 9 a. m. Will H. Clark, clerk."

18 And thereafter, on the 25th day of November, 1891, the following motion was filed, to wit:

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of the Third Judicial District within and for said Oklahoma County, October Term, 1891.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Come now the said plaintiffs, by their attorneys, Johnson & Horard, and move the court to strike from the files the instrument heretofore filed in said cause, to wit, on the 25th day of November, 1891, entitled a "general denial," and assigns as reasons therefor:

First. Said instrument is not signed and verified, as is by law required.

Second. It is apparent on the face of said instrument that the same is not filed in good faith, but is sham, and is designed only to effect delay.

JOHNSON, TRAVERS & HOWARD,
Attorneys for Plaintiff.

(Endorsements:) "333. 3-100. Dunham *et al. vs.* J. R. Holloway. Motion to strike answer. Filed Nov. 25th, 1891, at 2 p. m. Will H. Clark, clerk."

19 And thereafter, on the 13th day of June, 1892, the following journal entry was filed, to wit:

In the District Court in and for this County of Oklahoma and Territory of Oklahoma.

J. H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant. } Journal Entry.

Now, on this 13th day of June, A. D. 1892, this cause came on for hearing on the motion of defendant to suppress the depositions of J. H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A.

Davis, heretofore filed herein, plaintiff- appearing by Johnson, Howard & Travers, their attorneys, and defendant appearing by S. Armstrong and C. A. Leland, his attorneys; and, after argument of counsel, it is considered, ordered, and adjudged by the court that said motion be, and the same hereby is, overruled; to which judgment and order of the court overruling said motion the defendant duly excepted and excepts.

JOHN G. CLARK, *Judge.*

(Endorsements:) "333. Dunham *vs.* Holloway. Journal entry. Filed June 13, 1892. Will H. Clark, clerk, by Adah Curnutt, deputy."

20 And thereafter, on the 16th day of June, 1892, the following notice to clerk, of appeal, was filed, to wit:

In the Third Judicial District Court in and for Oklahoma County, Oklahoma Territory.

J. H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant. } Notice to Clerk of Appeal.

To Will H. Clark, clerk of the district court:

You are hereby notified that the defendant in the above-entitled cause will appeal to the supreme court of Oklahoma Territory from the judgment rendered against him in said cause in this above-entitled court on the 15th day of June, 1892.

C. A. LELAND &
S. ARMSTRONG,
Attorneys for Defendant.

I acknowledge service of the within notice and copy thereof this June 15th, 1892.

WILL H. CLARK,
Clerk Dist. Court.

(Endorsements:) "No. 333. J. H. Dunham *et al. vs.* J. R. Holloway. Notice to clerk of appeal. Filed June 16th, 1892. Will H. Clark, clerk."

21 And thereafter, on the 15th day of June, 1892, the following verdict was filed, to wit:

In District Court, Third Judicial District, in and for Oklahoma County.

JAMES H. DUNHAM *et al.*
vs.
J. R. HOLLOWAY.

We, the jury, duly empaneled and sworn in the above case, find for the*i*s plaintiff- on the attachment issue.

EUGENE WALKER, *Foreman.*

In District Court, Third Judicial District, in and for Oklahoma County.

JAMES H. DUNHAM *et al.*
vs.
J. R. HOLLOWAY.

We, the jury, duly empaneled and sworn in the above-entitled case, find for the plaintiff and assess his damages at — dollars, $5,434.61.

EUGENE WALKER, *Foreman.*

(Endorsements:) "333. Dunham *vs.* Holloway. Verdict. Filed June 15, '92. Will H. Clark, clerk."

22 And thereafter, on the 16th day of June, 1892, the following notice to plaintiff- of appeal was filed, to wit:

In the Third Judicial District Court in and for Oklahoma County, Oklahoma Territory.

J. H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
Notice to Plaintiff- of Appeal.

To J. H. Dunham *et al.*, plaintiffs, or Johnson, Travers and Howard, their attorneys of record:

The above-named plaintiffs are hereby notified that the defendant will appeal to the supreme court of Oklahoma Territory from the judgment against him in the above-named district court on the 15th day of June, 1892.

C. A. LELAND & S. ARMSTRONG,
Attorneys for Defendant.

We hereby acknowledge service of the within notice and the receipt of a copy thereof this 15th day of June, 1892.

JOHNSON, TRAVERS & HOWARD,
Attorneys for Plaintiffs.

(Endorsements:) "No. 333. J. H. Dunham *et al. vs.* J. R. Holloway. Notice to plaintiff- of appeal. Filed June 16, 1892. Will H. Clark, clerk."

23 And thereafter, on the 17th day of June, 1892, the following order of the court was filed, to wit:

In the Third Judicial District in and for Oklahoma County, Oklahoma Territory.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Comes now the defendant, J. R. Holloway, and prays an appeal to the supreme court of Oklahoma Territory in this cause, which is

granted upon his filing bond, within 7 days, in the penalty of $6,500.00, conditioned as provided by law, with John P. Johnson and J. P. Boyle as sureties, to be approved by the court.

JOHN G. CLARK, *Judge.*

(Endorsements:) "No. 333. James H. Dunham *et al. vs.* J. R. Holloway, def. Filed in district court Oklahoma Co., Ok. Ter., June 17, 1892. Will H. Clark, clerk, by Adah Curnutt, deputy."

24 And thereafter, on the 28th day of June, the following appeal bond was filed, to wit:

In the District Court, Third Judicial District, Oklahoma Territory, Oklahoma County.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant. } Appeal Bond.

Know all men by these presents that we, J. R. Holloway, as principal, and J. P. Boyle and Moses Neal, as sureties, are held and firmly bound unto James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb in the penal sum of six thousand and five hundred dollars; for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of June, 1892.

The condition of the above obligation is such that whereas, heretofore, to wit, on the 16th day of June, 1892, the said James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, in the said district court, recovered a judgment against the said J. R. Holloway for the sum of $5,434.61 and costs, from which said judgment of said court said J. R. Holloway has taken an appeal to the supreme court of Oklahoma Territory:

Now, if the said J. R. Holloway shall well and truly prosecute said appeal and abide by and pay the judgment and costs which may be rendered or affirmed against him, then the above obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands and seals this 25th day of June, 1892.

J. R. HOLLOWAY. [SEAL.]
J. P. BOYLE. [SEAL.]
MOSES NEAL. [SEAL.]

25 Approved June 25th, 1892.
JOHN G. CLARK, *Judge.*

OKLAHOMA TERRITORY, }
Oklahoma County. }

J. P. Boyle, having been duly sworn, says he has, in his own right, title, and name, property, over and above all his liabilities and exemptions, to the amount of $7,000.00; that said property consists of

real estate, $—; bank stocks, $7,000.00; that all of said property is situated in Oklahoma Territory.

J. P. BOYLE.

Subscribed and sworn to before me this June 20th, 1892.

T. M. RICHARDSON, JR.,
[SEAL.] *Notary Public.*

Com. expires April 28, 1895.

OKLAHOMA TERRITORY, }
Oklahoma County. }

Moses Neal, having been duly sworn, says he has, in his own right, title, and name, property, over and above all his liabilities and exemptions, to the amount of $2,500.00; that said property consists of real estate, $1,000.00; personal property, $1,500.00; that all of said property is situated in Oklahoma Territory.

MOSES NEAL.

Subscribed and sworn to before me this June 21st, 1892.

OLLIE E. CRAMER,
Notary Public.

My com. expires Dec. 8th, 1895.

(Endorsements:) "#333. Dunham *vs.* Holloway. Bond on appeal. Filed in the third district court June 28, 1892. Will H. Clark, clerk, Oklahoma county, Ok. Ter."

26 And thereafter, on the 30th day of June, 1892, the following bill of exceptions was filed, to wit:

In the District Court in and for the County of Oklahoma and Territory of Oklahoma.

JAMES H. DUNHAM *et al.*, Plaintiffs, }
vs. } Bill of Exceptions.
J. R. HOLLOWAY, Defendant. }

Be it remembered that on the 14th day of November, 1891, it being a judicial day of the October term, 1891, of said court, the following pleas and proceedings were had in said cause before the Hon. John G. Clark, judge of said court:

1st. The defendant moved the court to discharge the attachment heretofore issued in said cause and levied upon the property of the defendant upon the following grounds: Because the affidavit for order of attachment was insufficient in law; because the facts stated in said affidavit were not true; which motion with affidavits in support thereof were submitted to the court and not heard, the court then ruling that the questions raised by the motion should properly be submitted to the jury and should be determined on the final hearing of the case; to which defendant at the time excepted.

2nd. That afterwards, to wit, on the 11th day of June, 1892, it

being a judicial day of the April term of said court, the defendant filed his motion to suppress the deposition of J. H. Bradley, taken in behalf of the plaintiff-; which motion was as follows:

In the District Court of Oklahoma Territory within and for Oklahoma —, in the 3rd Judicial District.

27 JAMES H. DUNHAM *et al.*, Plaintiffs, *vs.* J. R. HOLLOWAY, Defendant. } Motion to Suppress Deposition.

Comes now the defendant, J. R. Holloway, by his attorneys, Williams, Armstrong & Turner, and moves the court to suppress the deposition of J. H. Bradley, a witness for plaintiff-, taken before S. A. Emanuel, a notary public, in New York city, New York county and New York State, between the hour- of 9 o'clock in the morning and 5 o'clock in the evening of Jan. 26th, 1892, for the following cause, to wit:

1st. The deposition was not taken in compliance with any provisions of the Oklahoma statutes.

2nd. The deposition was taken in violation of sections 4456, 4465, and of 4486 of the Oklahoma statutes.

3rd. The informality in the taking of said deposition is prejudicial to the substantial rights of the defendant.

4th. The officer's certificate annexed to the deposition does not show that the deposition was read over to the witness before he signed the same.

5th. The officer's certificate annexed to the deposition does not show that the deposition was written by a disinterested person.

6th. It appears from the record that written interrogatories were placed in the hands of the officer who took the deposition, and that neither the defendant or his attorneys were notified of this fact. The officer then, instead of acting the part of notary for both parties, acted as attorney for the plaintiff-.

7th. The officer has no right to propound interrogatories, except as given in section 4465, and then only after the witness is examined by the party producing him, also after examination by the adverse party.

8th. The answer to interrogatory — of the deposition is not responsive.

28 9th. The 5th interrogatory and all others were written by plaintiffs' attorneys and secretly transmitted to the notary who took the deposition, in violation of section 4486 of the Oklahoma statutes.

WILLIAMS, ARMSTRONG & TURNER,
Attorneys for Defendant.

And said motion was on the 13th day of June, 1892, a judicial day of said term, submitted to the court and overruled; to which the defendant at the time excepted; that on the 11th day of June, 1892, it being a judicial day of the April term of said court, the de-

fendant filed his motion to suppress the depositions of J. H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A. Davis, taken in behalf of the plaintiff; which motion was as follows:

In the District Court of Oklahoma County, of the Third Judicial District.

JAMES H. DUNHAM *et al.* *vs.* J. R. HOLLOWAY. } Motion to Suppress Deposition of James H. Dunham, John Dutcher, Henry Walker, and Edwin A. Davis.

Comes now the defendant and moves the court to suppress the depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis, taken before one S. A. Emanuel, of New York, on the 3rd day of December, 1891, for the following reasons:

1st. The certificate of the notary does not show the place where the said depositions were taken.

2nd. It is not shown that the said S. A. Emanuel was a notary public at the time of the taking of the said depositions.

3rd. The certificate nor any part of the record bears the date and expiration of the notary's term of office.

S. ARMSTRONG,
Attorney for Defendant.

And said motion was on the 13th day of June, 1892, a judicial day of said April term of court, submitted to the court and overruled; to which the defendant at the time excepted.

29 4th. That previous to the commencement of the trial of the cause the defendant objected to the introduction of any evidence to the jury until the motion to discharge the attachment had been disposed of. Objection overruled by the court and excepted to at the time by the defendant.

5th. That in the trial defendant objected to the reading of the deposition of James H. Dunham, for the reason that the certificate of the notary taking said deposition was insufficient; which objection was by the court overruled and excepted to by the defendant at the time.

6th. That in the trial the defendant objected to the exhibits attached to the depositions of Dunham, Dutcher, Walker, and Davis being read in evidence or any statements of said witnesses based upon them, for the reason that, as shown by the depositions of said witness Dunham, said exhibits were but copies of books of original entries, and were therefore incompetent and heresay and secondary evidence; which objection was by the court overruled and excepted to at the time by the defendant.

7th. That on the trial plaintiff objected to the cross-interrogatories of A. B. Smith in his deposition and witnesses' answers thereto being read to the jury; which objection was by the court sustained, excepting as to cross-interrogatory one and answer thereto; to which ruling of the court defendant at the time excepted.

8th. That on the trial of this cause the court gave to the jury the following instructions on its own motion:

In the District Court, Third District, Oklahoma County, Oklahoma Territory.

J. H. DUNHAM & Co., Plaintiff-,
vs.
J. R. HOLLOWAY, Defendant. } In Attachment.

Gentlemen of the jury, I instruct you as follows:

30 1st. This action was commenced for the purpose of recovering the purchase price of certain goods alleged by the plaintiff Dunham to have been sold to the defendant, J. R. Holloway.

2nd. To secure the collection of said debt, should the plaintiff recover judgment, the goods of the defendant were attached upon two grounds:

1st. That the said defendant was not a resident of this Territory.

2nd. That he was fraudulently disposing of his property with intent to cheat, hinder, or delay his creditors.

3rd. You are trying two issues:

1st. Whether or not the attachment herein shall be sustained.

2nd. Whether or not at the time of the commencement of this suit and at the present time the defendant was and is indebted to plaintiffs; and, if so, in what sum? and upon these two issues you will make separate verdicts.

4th. The burden of the proof of both of these propositions is upon the plaintiffs, and before you can find in their favor they must prove the same by a preponderance of the evidence.

5th. If you shall find from the evidence that the defendant at the time of the issuing of the writ of attachment herein was a non-resident of the Territory of Oklahoma, you will find the issue for the plaintiffs on this attachment; or if you find from the evidence — was disposing of his property subject to execution with the fraudulent intent to cheat, hinder, or delay his creditors at the time of the issuing of the writ of attachment herein, you will find the issue for the plaintiffs in the attachment.

6th. Fraud is not to be presumed without proof, yet, like any other fact, it may be proved by proving other facts and circumstances from which fraud may be inferred. Direct and positive proof is not required, nor must it be proved beyond a reasonable doubt, as in criminal actions, but to the satisfaction of the jury, by a preponderance of the testimony.

31 7th. To constitute a change of residence in contemplation of law, in attachment suits, there must not only be an actual change of abode, but it must also be with the intent of making it, the place to which the party removes, the fixed and permanent home of the party. The fact that his family has or has not accompanied him is a circumstance that the jury may consider in determining whether or not the change has been made in good faith. In fact, they should consider all the circumstances and testimony in considering this question.

8th. You are the exclusive judges of all the facts and circum-

stances and of the weight to be given to the testimony of each of the witnesses, and should take all the facts and circumstances into consideration in passing upon the question of the residence of the defendant at the time of the suing out of the attachment, and as to the question as to whether he intended to hinder, delay, or defraud his creditors, and as to the amount due the plaintiff if you so find.

9th. Though you may believe from the evidence that the defendant came from the State of Texas and located in Oklahoma city on or about September, 1891, and here engaged in business in the selling of goods, wares, and merchandise, yet this of itself does not constitute him a resident of the Territory of Oklahoma. To constitute him a resident of Oklahoma Territory he must, in addition to having moved here and engaged in business, had determined to make this, Oklahoma, Territory, his permanent residence; and if you believe from the evidence that he left his family at Ft. Worth, in the State of Texas, and that Ft. Worth was the home of himself and family at the time he left there, and that he did not, at the time of his leaving there nor at the time of the issuing of the writ of attachment herein, intend to make Oklahoma Territory the place of his permanent residence, or if he was undetermined as to whether or not he would make Oklahoma Territory the place of his permanent residence, or that he intended to return to his home and family at Ft. Worth, Texas, at some future time, then and in that event he was a non-resident of the Territory of Oklahoma at the time the writ of attachment issued in this case.

32 10th. If you believe from the evidence at the time of the institution of this suit the defendant was and is now indebted to the plaintiff- for goods, wares, and merchandise purchased of plaintiff- by defendant, as charged in said complaint, then you will find for the plaintiff- in such sum as the evidence shows to be due them, with interest thereon, at the rate of seven per cent. per annum, from March 23rd, 1891, to the present.

11th. If you believe from the evidence that the defendant was selling and disposing of his goods and property and was not appropriating the proceeds of the sales to the payment of his debts and was refusing to pay his debts or secure them, then these are facts and circumstances that you may take into consideration in determining whether or not he was disposing of his property with a fraudulent intent—to cheat, hinder, or delay his creditors; and if you find from the evidence he was so doing, you will find for the plaintiff- on the issue in attachment.

12th. If the jury believe from the evidence that the defendant did not intend to make Oklahoma Territory his permanent home at the time the attachment was sued out herein, and had not come here with the intention of changing his domicile in Texas, but came here for the purpose of engaging in business temporarily and with the intent of returning to his home and family in Texas at some future time, then and in that event he is, for the purpose of attachment in this case, a non-resident of the Territory of Oklahoma.

13th. You need not be unanimous in determining what your verdict shall be. Nine of you can determine upon a verdict.

14th. Forms of verdict will be handed to you.
June 15, 1892.

JOHN G. CLARK, *Judge.*

The questions hereto attached you will answer by writing after each question the words "yes" or "no." You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

Your foreman will sign each of the verdicts and also this special verdict when you are agreed.

JOHN G. CLARK, *Judge.*

33 In the District Court in and for the County of Oklahoma and Territory of Oklahoma.

J. H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Special Questions Submitted to the Jury.

Was J. R. Holloway on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with intent to cheat, hinder, or delay his creditors? Yes.

Was J. R. Holloway on the 31st day of October, 1891, a non-resident of Oklahoma Territory? Yes.

EUGENE WALKER, *Foreman.*

To the giving of which instruction and each of them the defendant at the time excepted.

And the defendant asked the court to give the following instructions:

In the District Court in and for the County of Oklahoma and Territory of Oklahoma.

J. H. DUNHAM *et al.*, Plaintiff,
vs.
J. R. HOLLOWAY, Defendant.

You are instructed that under the law there is not sufficient evidence in this case to justify a finding by you that the defendant was about to sell or dispose of his property with intent to defraud his creditors, or that he was a non-resident of Oklahoma Ter-
34 ritory, as charged, and therefore you are directed to find that the attachment in this action was unlawfully issued.

Gentlemen of the jury, there are two questions submitted for your consideration in this action:

1st. Was the attachment rightfully issued in this action?

2nd. How much, if any, is the defendant indebted to plaintiff?

You are instructed that the burden of proof of both of these propositions is upon the plaintiffs, and before you can find in their favor they must prove the same by a preponderance of the evidence.

You are further instructed that fraud is never presumed, but must be proven by evidence satisfactory and convincing to your minds.

You are further instructed that if the circumstances relied upon by the plaintiff- to establish the fraudulent intent are just as consistent with honesty and dishonesty of purpose, no inference of the latter arises.

You are further instructed that a party who comes into this Territory with the intention of abandoning his former residence and residing in the Territory, but whose wife remains in his former home for some months later, but who soon afterwards removes to this Territory, and with him becomes and remains an actual resident thereof, is not a non-resident and cannot be proceeded against by attachment.

To sustain the attachment plaintiffs must prove either that the defendant at the time of the issuance of the attachment, to wit, October 31st, 1891, was about to sell and convey and otherwise dispose of his property with intent to cheat, hinder, and delay his creditors, and that such property was subject to execution, or that the defendant at the time of attachment was a non-resident of the Territory of Oklahoma; failing to so find from the evidence, your finding should be that the attachment was not rightfully issued; which the court refused; to which refusal to give each and all of said instructions defendant at the time excepted.

That afterwards, to wit, on the 16th day of June, 1892, a
35 judicial day of said term, the said defendant filed his motion for a new trial of said cause as follows:

In the District Court of the Third Judicial District in and for Oklahoma County, Oklahoma Territory.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

The defendant in the above-entitled action moves the court for a new trial thereof on the following grounds:

1. The court erred in refusing to grant the defendant an early hearing on his motion to discharge the attachment.

2. The court erred in ordering a trial of the question of the validity of the attachment to a jury.

3. The court erred in requiring a trial as to the validity of the attachment in conjunction with a trial as to the merits on the complaint.

4. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

5. The court erred in everruling defendant's motion to suppress the deposition- of James H. Dunham, J. T. Dutcher, Wm. H. Walker, and Edwin A. Davis.

6. The court erred in allowing the exhibits attached to the deposition- of James H. Dunham, J. T. Dutcher, W. H. Walker, and Edwin A. Davis to be read in evidence.

7. The court erred in refusing to allow the cross-interrogatories 2, 3, and 4 of the deposition of A. B. Smith to be read in evidence.

8. The court erred in refusing to allow the cross-interrogatory 1 of the deposition of James Riley to be read in evidence.

9. The court erred in refusing to allow the witness A. O. Kincaid and Mrs. White to testify as to what defendant said to them
36 in his efforts to procure a home for his family and their replies thereto.

10. The court erred in refusing all of the instructions asked for by the defendant.

11. The court erred in refusing instructions 3 and 4 asked for by defendant.

12. The court erred in giving instructions numbered 6, 8, 9, 10, and -1.

13. The assessment of the amount of recovery is erroneous, being too large.

14. The verdict of the jury on the attachment issue is not supported by sufficient evidence.

15. The verdict of the jury on the attachment issue is contrary to law.

16. The verdict of the jury on the amount of recovery is not sustained by the evidence and is contrary to law.

17. The special findings of the jury numbered 1 and 2 are not sustained by the evidence and are contrary to law.

C. A. LELAND & S. ARMSTRONG,
Attorneys for Defendant.

We hereby acknowledge service and a copy of the above motion for a new trial.

JOHNSON, HOWARD & TRAVERS,
Attorneys for Plaintiff.

Which said motion was submitted to the court and overruled, and defendant excepted.

37 Be it further remembered that on the 16th day of June, 1892, it being a judicial day of the April term of the district court—Hon. John G. Clark, judge, presiding—the following further proceedings were had in this cause:

The cause being at issue, and a jury empanneled and sworn, the plaintiffs, to maintain the issues on their behalf, introduced the following evidence:

Plaintiffs offered and read the deposition of J. H. Bradley; also the depositions of James H. Dunham, J. T. Dutcher, Henry H. Walker, and Edwin A. Davis; also the depositions of A. B. Smith and James Riley. (Here insert.) To the introduction of which the defendant at the time excepted.

(The following depositions were not contained in the original bill of exceptions filed on the 30th day of June, 1892, and are now inserted upon præcipe and order of defendant's attorneys, Amos Green & Son, this 26th day of January, 1893.)

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant. } Deposition.

Deposition of J. H. Bradley, taken before me, S. A. Emanuel, at my office, in New York city, New York county, State of New York, between the hours of 9 o'clock a. m. and 5 o'clock p. m. on Tuesday, January 26th, 1892, to be used upon the trial of the above-entitled cause in said court upon the part of the plaintiffs therein.

The plaintiff- appeared (state whether in person or by att'ys,
38 and if by att'ys, give name) and the defendant appeared (state whether he did or did not appear, and, if so, whether in person or by attorney, and if by attorney, give name), and J. H. BRADLEY, being produced as a witness on behalf of plaintiff- and by me first duly sworn, testifies as follows, to wit:

Int. 1. You may state your name, age, place of residence, and avocation.

Int. 2. You may state whether on or about October 26th, 1891, you were in the employ of Dunham, Buckley & Co., the plaintiffs in the above-entitled cause, and where you were on or about that date.

Int. 3. Are you acquainted with Mr. J. R. Holloway, the defendant in the above-entitled cause?

Int. 4. State whether or not you had any conversation with him at Oklahoma city, Oklahoma county, Territory of Oklahoma, on or about October 26th, 1891.

Int. 5. You may now state what that conversation was, if any such was had.

Int 6. You may state what, if anything, the defendant, Mr. Holloway, said to you with reference to his family in this conversation.

Int. 7. You may state whether or not he told you where his family resided at that time; and, if so, where he said they lived.

Int. 8. You may state what, if anything, he said with reference to his intention of removing his family from Fort Worth, in the State of Texas, to Oklahoma city, in the Territory of Oklahoma.

Int. 9. You may state what reasons, if any, he assigned why he had not removed them or did not intend to do so at an early date, and state fully any and everything that was said in the conversation with reference to the residence of his family.

Int. 10. You may now state whether or not anything was said in that or any other conversation had with him on or about that date with reference to matters involved in the above-entitled cause referring to his indebtedness to the plaintiffs.

39 Int. 11. You may state whether or not you presented to him the account in controversy, and what, if anything, he said with reference thereto on or about that date, and what, if anything, he said with reference to the indebtedness, as to whether or not he was indebted in the amount mentioned in the account.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, Charles H. Webb, and William E. Webb, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Notice to Take Depositions.

To the above-named defendant, J. R. Holloway, and to Armstrong, Turner and Williams, his attorneys of record:

You are hereby notified that on Tuesday, the 26th day of January, 1892, at 340, 342, and 344 Broadway, New York city, in the State of New York, before S. A. Emanuel, a notary public, at the hour of 9 o'clock a. m., and between that time and 5 o'clock p. m. of said day, we will take the depositions of J. H. Bradley, to be used in the above-entitled cause on the part of the plaintiffs therein, to be used upon the trial of said cause in said court, at which said time and place you can appear and propound cross-interrogatories to such witness in case you see fit so to do.

Dated Oklahoma city, Oklahoma county, Territory of Oklahoma, this 16th day of January, A. D. 1892.

——.

I hereby acknowledge service of this notice and receipt of a copy this 16th day of January, 1892.

J. R. HOLLOWAY, *Defendant,*
By WILLIAMS, ARMSTRONG & TURNER,
His Attorneys.

40 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Deposition of J. H. Bradley, taken before me, S. A. Emanuel, at Nos. 340, 342, and 344 Broadway, New York city, New York county, in the State of New York, between the hours of 9 o'clock a. m. and 5 o'clock p. m. on Tuesday, January 26th, 1892, to be used upon the trial of the above-entitled cause in said court upon the part of plaintiff- therein.

The plaintiffs did not appear in person nor by attorney. The defendant did not appear in person or by attorney; and J. H. BRADLEY, being produced as a witness on behalf of plaintiffs and by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, testified as follows, to wit:

Int. 1. You may state your name, age, place of residence, and avocation.

Ans. My name is John H. Bradley; I am 55 years of age; I reside at East Orange, New Jersey, and by avocation am a general salesman and sometimes attend to office duties connected with the credit department of Dunham, Buckley & Co., New York city.

Int. 2. You may state whether on or about October 26th, 1891, you were in the employ of Dunham, Buckley & Co., the plaintiffs in the above-entitled cause, and where you were on or about that date.

Ans. I was in their employ on or about October 26th last. I was in Oklahoma city, Oklahoma Territory.

41 Int. 3. Are you acquainted with Mr. J. R. Holloway, the defendant in the above-entitled cause?

Ans. I am acquainted with him.

Int. 4. State whether or not you had any communication with him at Oklahoma city, Oklahoma county, Territory of Oklahoma, on or about October 26th, 1891.

Ans. I did. I had four or five conversations with him during the four or five days that I was at Oklahoma city.

Int. 5. You may now state what that conversation was, if any such was had.

Ans. While at Fort Worth, Texas, I was requested by Dunham, Buckley & Co. to see what I could do towards collecting or securing their claim against J. R. Holloway. I had ascertained that he had moved away to Oklahoma city, and I went there and had several conversations with him. I think the first one was on or about October 28th last, at his store. I called there, and after exchanging

the usual salutations, I asked him why he had moved away from Fort Worth. He stated that business was dull, with small hope for its reviving this fall or winter; that with the large stock of Randel & Chambers Company thrown on the market (they had failed) and B. C. Evans Company, Taylor, G. G. Smith, and other stocks, he thought it was impossible for him with his small stock to do much business there, especially the way they were cutting and slashing prices, so he concluded to try the experiment of moving his stock out here (Oklahoma city), hoping by the change to dispose of a large portion of it, if not all. We both looked through the stock, and he said he thought it a good staple one, barring an overstock in silks and cloaks and jackets. He told me that he had just received a few goods, and called my attention to some comfortables that had just come in; that he had more goods coming to tone it up—in all, about $1,000; that he could not dispose of his stock without putting in some few new goods, especially staples. I
42 asked him what amount of stock he had on hand. He said he had about $10,000 when he left Fort Worth. I asked him what rent he was paying, and he said $75 per month. I asked him what it cost him to move. He said about $400, and had to put out some money on fixtures. I asked him about his help—what expense he was under in that. He said he had brought his boy or his boys along with him and he and they were doing the work. I then asked him how he found business since he opened. He said it had been dull; that he was only open a short time, being a stranger there, and short of a good many articles that were being called for would account for that, but that he was bound to reduce his stock in some way, even if he had to do it by forced sales and lower prices, and called my attention to an advertisement that he then had in a newspaper. I asked him if he had made the change with the intention of making Oklahoma city his permanent home, and he said, "No;" it was his intention to dispose of all or as large a portion of his stock as he could and then return to Fort Worth, and thought he would go into the millinery business there; that there was more money in that than in general merchandising. I told him that I noticed his awning sign still hanging at Fort Worth, and he said yes, but that he would never return to the old store, as the location was poor. I then said to him, "This move, then, is an experiment, and you still regard Fort Worth as your home?" And he said, "Yes." I asked him where he was stopping now, and he answered that he was boarding at the hotel. We then in a general way spoke of the number of stores and large stock at Oklahoma city, his being a stranger, and the location he had selected—the probable chances of his meeting with success. He said, "Well, I am going to try it for a while," and then repeated his former statement of getting new goods, reducing prices, etc. This conversation lasted a couple of hours. I then had another conversation with him the same day and also the following day. I asked him what he intended to do about this account, which was long past due to Dunham, Buckley & Co.; that they had been very lenient with him, and that I was not there to prosecute him. He said

he couldn't pay it; hadn't any money. I then asked him if he
43 could not pay a part of it and I would extend payment of the balance, and he said, No, he couldn't. I then asked him what he could do; he said he didn't know. I asked him what kind of security he could give me, providing I would give him long time, he to give me his notes. He said he didn't want to give any notes because he did not know if he could meet them. I told him I would aid him with Mr. Dunham to try and pay those notes off, if he would only give me security. I told him I did not come there to force him into a settlement, but to see if he could not solve the problem, so that in time Dunham, Buckley & Co. would get their money. He said the only thing he had was some lands in Indiana and Kansas, and that he would give these in payment or settlement of the account. I asked him where they were located, and he said he couldn't tell exactly, but he would look it up. I asked him if they were improved lands, and he said the lands in Indiana were improved and a part of the Kansas property was also improved. I asked him if they were encumbered, and he said, Yes. I then asked him to look up the matter and to let me know where each parcel was located—the number of acres, the incumbrances, the improvements, and whether the taxes had been paid. I asked him if he did not have some map or something that would show where these lands were located, and he said, "No," but that he could show in a railroad map where they are located, and went around looking for one. We got one and it showed nothing. I asked him if he did not have an abstract to show where they were located; he said he didn't know. I told him I did not want to be thwarted in coming here; that I wanted to know what he could do and what he couldn't do, and, finally, he went to his safe and brought descriptions of these lands. He said he owned a third interest in 200 acres of land in Pulaski county, Indiana, incumbered for $167, improved; 320 acres in Woodson county, Kansas, encumbered $800, unimproved; 160 acres in Butler county, Kansas, incumbered $1,000, improved. I asked him if he would give a lien or mortgage on these lands as security if I would give him time. He said, "No;" he would give the lands for the debt. I asked him what the lands were worth, and he refused to put any valuation on them. I again
44 offered to give him from 2 to 15 months, or even longer time, if he would give me his notes and the land as security. He said, "No;" the only thing he would do was to give these lands in payment of the debt. I then told him I could not then accept his offer, but I would wire the whole matter to Dunham, Buckley & Co. This I did, and they refused to accept his offer.

At another interview, and before I instituted any proceedings against him, I again made the same proposal to him, and he again told me he would only give the lands in payment of the debt, but would not tie up the lands by any lien or mortgage. This he said with a great deal of feeling, both in actions and in words. I then told him that I had wired to Dunham, Buckley & Co. his proposals and also written to them fully all the conversations that had taken place between us, and had received their instructions that if he did

not comply with my request, to proceed and attach at once to secure the debt. I then told him I had made all arrangements to carry these instructions into effect unless he would comply with my request, and that it was not unreasonable, for Dunham, Buckley & Co. had been very lenient with him and I felt kindly disposed to aid him in every possible way that I could, but I must follow the instructions of Dunham, Buckley & Co. unless he did something to pay or secure the debt. I even went so far as to offer to accept a sufficient amount of his stock to secure the debt; all of which he declined. I could take the lands or else must wait until he could pay the debt, was all he would say or do. At one of these interviews we compared the statement that I presented with his books.

Int. 6. You may state what, if anything, the defendant, Mr. Holloway, said to you with reference to his family in this conversation.

Ans. I don't remember anything special that Mr. Holloway said to me in reference to his family. Our conversations were mostly upon business matters, and particularly as to his indebtedness to Dunham, Buckley & Co., and the object of his coming to Oklahoma city.

Int. 7. You may state whether or not he told you where his family resided at that time; and, if so, where he said they lived.

45 Ans. I have no recollection at present whether or not he told me where his family resided at that time.

Int. 8. You may state what, if anything, he said with reference to his intention of removing his family from Fort Worth, in the State of Texas, to Oklahoma city, in the Territory of Oklahoma.

Ans. As all my efforts were directed mainly, if not wholly, toward the collection or settlement of the account, I have no distinct recollection what, if anything, Mr. Holloway stated to me about removing his family. He referred to his trip to Oklahoma city as an experiment for the purpose of reducing or disposing of his stock on hand.

Int. 9. You may state what reason, if any, he assigned why he had not removed them or did not intend to do so at an early date, and state fully any and everything that was said in the conversation with reference to the residence of his family.

Ans. I cannot now recollect any reason assigned by him why he had not removed them or did not intend to do so at an early date. I asked him no question about his family, so far as I can now recollect.

Int. 10. You may now state whether or not anything was said in that or in any other conversation had with him on or about that date with reference to matters involved in the above-entitled cause, referring to his indebtedness to the plaintiffs.

Ans. I have given in detail in my answer to the 5th interrogatory everything I could possibly remember of the conversations had between Mr. Holloway and myself, with the exception of what occurred when we together compared the statement furnished by Dunham, Buckley & Co. with his books of account.

Int. 11. You may state whether or not you presented to him the account in controversy and what, if anything, he said in reference thereto on or about that date, and what, if anything, he said with

reference to the indebtedness, as to whether or not he was indebted in the amount mentioned in the account.

Ans. I did present a statement of the account to J. R. Holloway; it was the one furnished to me by Dunham, Buckley & Co.

46 We compared the extensions of figures with the entries in his books of account, or his memoranda, and found that they agreed with each other, with the single exception of a charge of $1.65, which I explained to him was a charge of expressage on goods returned by him to Dunham, Buckley & Co., and if he had not received a notice of this item it was through an oversight at the New York office. He then and there acknowledged to me after such examination that the account due by him to Dunham, Buckley & Co. was correct in every particular, and that he was indebted to them in the amount claimed to be due.

J. H. BRADLEY.

STATE OF NEW YORK, }
County of New York, } ss:

I, S. A. Emanuel, a notary public within and for said county, hereby certify that the above and foregoing deposition of J. H. Bradley was written by me; that before giving the above and foregoing testimony the said J. H. Bradley was first by me duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the above-entitled cause; that at the taking of said testimony the plaintiff did not appear in person or by attorney, and that the defendant did not appear in person or by attorney.

That the above and foregoing deposition was taken by me at the place mentioned in the notice hereto attached on the day therein named, to wit, January 26th, 1892, and was taken between the hours of 9 o'clock in the morning and 5 o'clock in the evening, and subscribed by the said witness in my presence.

In witness whereof I have hereunto set my hand and seal this 26th day of January, A. D. 1892.

S. A. EMANUEL,
Notary Public, N. Y. Co.

[SEAL.]

Fees & disbursements paid by plaintiffs, $31.50

S. A. EMANUEL.

47 (Endorsements on the back of said deposition:)

"Opened by order of B. F. Turner, Feb. 2nd, 1892. Will H. Clark, clerk.

(Endorsements on the envelope in which said depositions were received as follows, to wit:)

"Will H. Clark, Esq., clerk of the district court, Oklahoma city, Oklahoma Territory. Territory of Oklahoma, Oklahoma county. In the district court of said Territory within and for said county, in the third judicial dist. James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb *vs.* J. R. Holloway. Deposition of J. H. Bradley, a witness on behalf of plaintiffs in above action, taken on 26th of January, 1892, before me, S. A. Emanuel,

10 Wall St., N. Y. city, N. Y. Filed in the third district court January 30, 1892. Will H. Clark, clerk, Oklahoma county, Ok. Ter. 33–3–100. Opened Feb. 2, 1892, by order of Turner. Will H. Clark.

TERRITORY OF OKLAHOMA, *Oklahoma County,* } ss:

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, Charles H. Webb, and William E. Webb, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Notice of Taking Depositions.

To the above-named defendant, J. R. Holloway, and to Stone & Lewis, his attorneys of record:

Notice is hereby given that, before S. A. Emanuel, a notary public, at No. 10 Wall street, New York city, in the State of New York, commencing at 10 o'clock on Wednesday, the 30th day of December, 1891, and continuing until the same are finished, and, if
48 necessary, adjourning from day to day for that purpose, we will proceed to take the depositions of James H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A. Davis, to be used upon the part of the plaintiffs in the above-entitled cause at the trial thereof in said court, at which said time and place you may appear and propound cross-interrogatories to said witnesses in case you see fit so to do.

Dated this 4th day of December, A. D. 1891.

JAMES H. DUNHAM,
WILLIAM T. BUCKLEY,
CHARLES H. WEBB, AND
WILLIAM E. WEBB,
By STANLEY, JOHNSON & HOWARD,
Their Attorneys.

I hereby acknowledge service of this notice and the receipt of a copy thereof this 4th day of December, 1891.

J. R. HOLLOWAY, *Defendant,*
By WILLIAMS & TURNER,
His Attorneys.

TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the District Court of said Territory within and for said County, in the Third Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Depositions of witnesses taken before S. A. Emanual, a notary public within and for New York county, in the State of New York, in pursuance to the notice hereto attached, to be used on the part of the plaintif-s, to be used on the trial of said cause in said court.

49 Now, on this 30th day of December, A. D. 1891, before me, the undersigned, S. A. Emanuel, a notary public within and for New York county, in the State of New York, appear- James H. Dunham, one of the plaintiffs, while giving his testimony (otherwise neither plaintiffs nor defendant appeared in person nor by counsel or attorney), and the following witnesses were produced and testified before me, to wit:

JAMES H. DUNHAM, of lawful age, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the above-entitled cause, testified as follows, to wit:

Q. What is your name, age, and occupation and where do you reside?

A. My name is James H. Dunham; I am 60 years of age; I am a merchant, and I reside at 37 East 36th street, New York city.

Q. Are you a member of the firm of Dunham, Buckley & Co.? If so, please state who composed that firm during 1890 and 1891 and where is their place of business.

A. I am a member of that firm. It is composed of James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb. The same persons constituted our firm in 1890. We do business at Nos. 340, 344 Broadway, New York city.

Q. Has your firm had any business dealings with the defendant or with J. R. Holloway & Co.? If so, please state in detail the nature and extent of such transactions.

A. Between the 28th day of August, 1890, and the 7th day of March, 1891, both dates inclusive, our firm sold and delivered to the defendant, who was doing business in Fort Worth, State of Texas, under the name of J. R. Holloway & Co., goods, wares, and merchandise of the value of $5,698.78.

Q. What portion, if any, of this indebtedness has been paid? State any credit or offset to which this account is entitled.

A. We received $601.49 on account on April 22nd, 1891, and the indebtedness is also entitled to a credit of $72.71 for merchandise returned, leaving a balance of $5,024.58, which is all past
50 due and no part of which has been paid, and upon which sum interest is due from March 23rd, 1891.

Q. Please attach a statement of this account and itemized bills sold and delivered by your firm to J. R. Holloway & Company.

A. I hand to the notary the papers asked for. They are just, true, and correct transcripts, copied from our regular books of original entry.

Statement of account marked "Exhibit A;" itemized bills marked Exhibits 1 to 34, inclusive.

Q. Please state what merchandise was returned for which your firm credits the account with $72.71.

A. I hand to the notary itemized bills of the goods returned to us.

Itemized bills marked Exhibits 35 to 38, inclusive.

JAMES H. DUNHAM.

And likewise appeared at the same time and place JOHN T. DUTCHER, who, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, testified as follows, to wit:

Q. What is your name, age, occupation, and where do you reside?

A. My name is John T. Dutcher; I am 55 years of age; I am a general salesman in the employ of Dunham, Buckley & Co., of New York city. I reside at Plaza hotel, New York city.

Q. Do you know J. R. Holloway, the defendant, and did you, as such salesman, have any business transactions with him or with J. R. Holloway & Co.?

A. I know J. R. Holloway. I sold him some goods for Dunham, Buckley & Co. Some of these goods were purchased by him in person and some were purchased upon written orders from J. R. Holloway & Co.

Q. Please examine the exhibits attached to deposition of James H. Dunham and designate which goods were purchased by
51 J. R. Holloway personally and which were ordered in writing.

A. The goods described in Exhibits Nos. 1 to 12, inclusive, and Exhibit No. 34, answer to deposition of Mr. James H. Dunham, were sold by me to Mr. J. R. Holloway in person. The other goods described in the exhibits were ordered by J. R. Holloway & Co., in writing, and the orders are attached to the said exhibits.

Q. Did you receive any instructions from Holloway as to when the goods were to be forwarded; if so, what were they, and were those instructions followed?

A. Yes; he ordered the goods shipped to Fort Worth, Texas, and they were all sent there except goods mentioned in Exhibit No 7; these I delivered to him in person.

Q. How long have you known J. R. Holloway?

A. I have known him personally for the past ten years, but have known of him for the past twenty years.

Q. Where was his place of business?

A. He was in Eldorado, Kansas, for two or three years, doing

business under the firm name of J. R. Holloway & Co., but he had no partner that I know of. He then moved to Fort Worth, Texas, about a year ago this fall, and continued his business under the same firm name. He then moved to Oklahoma some time this fall.

JOHN T. DUTCHER.

And likewise appeared at the same time and place HENRY H. WALKER, who, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, testified as follows, to wit:

Q. What is your name, age, and occupation, and where do you reside?

A. My name is Henry H. Walker; I am 39 years of age; I am in the employ of Dunham, Buckley & Co., New York city, and have charge of the packing department of that firm. I reside at 228 West 37th street, New York city.

52 Q. What are your duties in that position, and were you so employed during 1890?

A. All goods sold by Dunham, Buckley & Co. are charged against the purchaser and packed ready for shipment and marked under my supervision. I was so employed during the year 1890.

Q. Were any goods charged and packed in your department to J. R. Holloway & Co. during 1890 and 1891? If so, please state what they were and when.

A. Yes; all the goods designated in Exhibits 1 to 34, annexed to deposition of Mr. James H. Dunham, were charged to J. R. Holloway & Co. and packed under my supervision. This was done at or about the dates mentioned in said exhibits.

Q. What became of those goods after they were packed and marked?

A. They were delivered to Edwin A. Davis, in charge of the shipping department, to be forwarded to their destination, except goods described in Exhibits No. 7; these were delivered to J. T. Dutcher.

HENRY H. WALKER.

And likewise appeared at the same time and place EDWIN A. DAVIS, who, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to said cause, testified as follows, to wit:

Q. What is your name, age, and occupation, and where do you reside?

A. My name is Edwin A. Davis; I am 34 years of age; I am in the employ of Dunham, Buckley & Co. and have charge of the shipping department of that firm. I reside at No. 186 Trenton street, Brooklyn, New York.

Q. What are your duties in that position; and were you so employed during 1890?

A. All goods sold by Dunham, Buckley & Co., after they have been charged against the purchaser, are packed and marked

53 in the entry and packing department, and are then delivered to me for shipment. I was so employed during the year 1890

Q. Did you receive any goods packed and marked as above stated to be forwarded to J. R. Holloway & Co.? If so, *state* please state where they were shipped, if you know.

A. I did receive goods marked "J. R. Holloway & Co., Fort Worth, Texas," during 1890 & 1891. They were shipped by me to their destination.

Q. When were they shipped?

A. From August 29, 1890, to March 7, 1891.

Q. They were all forwarded according to the instructions received from the purchaser?

A. Yes, sir.

Q. Did you ship all the goods received by you from the entry and packing department marked as above stated?

A. I did.

EDWIN A. DAVIS.

54 Folio 17953.
Salesman, Dutcher.

NEW YORK, *Dec. 14th*, 1891.

Mess. J. R. Holloway & Co., Fort Worth, Texas, to Dunham, Buckley & Co., Nos. 340, 342, & 344 Broadway, Dr.

1890.		To mdse.:					
Nov.	1.	To mdse. as	Dec.	31.....	60 ds.	100 33	
	6.	"	Jan.	6.....	"	14 03	
							114 36
Aug.	28.	"	Nov.	1.....	4 mos.	410 85	
	29.	"	"	1.....	"	597 76	
	29.	"	"	1.....	"	625 39	
	30.	"	"	1.....	"	45 35	
Sep.	1.	"	"	1.....	"	481 79	
	3.	"	"	3.....	"	273 13	
	3.	"	"	3.....	"	1 13	
	3.	"	"	3.....	"	358 14	
	3.	"	"	3.....	"	31 75	
	4.	"	"	4.....	"	260 20	
	3.	"	"	3.....	"	1,472 37	
	8.	"	"	8.....	"	5 25	
	23.	"	"	23.....	"	68 00	
Oct.	20.	"	Dec.	20.....	"	42 51	
	24.	"	"	24.....	"	41 65	
	27.	"	"	27.....	"	45 00	
	31.	"	"	31.....	"	59 16	
Nov.	1.	"	"	31.....	"	39 57	
	3.	"	Jan.	3.....	"	15 00	
	7.	"	"	7.....	"	15 75	
	7.	"	"	7.....	"	46 00	
	11.	"	"	11.....	"	10 05	
	11.	"	"	11.....	"	55 25	

55

Nov. 25.	To mdse. as	Jan. 25.....	4 mos.		24 13	
25.	"	" 25.....	"		31 45	
26.	"	" 26.....	"		3 22	
Dec. 9.	"	Feb. 9.....	"		9 06	
10.	"	" 10.....	"		44 92	
15.	"	" 15.....	"		12 05	
31.	"	Mar. 1.....	"		5 00	
1891.						
Jan. 30.	"	Mar. 30.....	"		60 02	
Mar. 7.	"	May 6.....	"		393 52	
					5,584 42	
	Cr. by mdse.....			15 36		
	" "	....		24 00		
	" "	.....		23 00		
	" "	.....		12 00		
				74 36		
	Less ch'g's.....			1 65		
					72 71	
						5,511 71
1891.						5,626 07
Ap'l 22.	Cr. by cash.....					601 49
	Due M'ch 23, '91.....					5,024 58

Exhibit "A." S. A. Emanuel, notary, &c.

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NEW YORK, *August* 28, 1890.

Mess. J. R. Holloway & Co., Fort Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book f 52, folio 38.
Terms, 4 months' credit for notes payable with exchange.
Nov. 2, '90.
Shipped in packages, No. 469.

320.....	½ dz.	jersey.....	6	.....	3
905.....	½	"	12	.....	6
620.....	½	"	16 50	....	8 25
3619.....	2	plush jackets...	10 50	....	21 00
3629.....	3	" ...	13 00	....	39 00
608.....	3	" ...	6 50	.....	11 50
710.....	3	" ...	7 00	.....	21 00
2..	2	capes.....	2 50	....	5 00
10...	2	capes.....	3 75	.....	7 50

17.	1 cape			5 00
4926	2 plush jackets	7 50		37 50
1000/6	3 misses' cloaks	1 00		3 00
1105/8	2 "	1 05		2 10
4	2 "	1 50		3 00
1013/8	2 "	2 00		4 00
10	2 "	2 25		4 50
12	2 "	2 50		5 00
5003	5 jackets	3 50		17 50
318	6 "	3 50		21 00
308	6 "	2 75		16 50
209	6 "	3 00		18 00
509	3	5 00		15 00
57				
287	3 jackets	5 00		15 00
512	4 "	6 00		24 00
229	6 "	4 50		27 00
231	3 "	6 00		18 00
76/2	2 misses' cloaks	3 50		7 00
06/12	2 "	5 00		10 00
202/8	1 reefer			2 50
12	2 "	2 50		5 00
916	1 "			2 50
214/14	1 "			3 50
16	1 "			3 50
216/14	1 "			3 50
16	1 "			3 50
Coop				50
				$410 85

Exhibit No. 1. S. A. Emanuel, notary, &c.

58 NEW YORK, *Aug.* 29, 1891.

M. J. R. Holloway & Co., Fort Worth Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book 9, folio 82.
Nov. 1, 4 mos.
Shipped in packages, No. 2455.

	4 Hathaway flannel	184,	9	16 56
D 15	1 elect. velveteen	28,	30	8 40
38 A	1 nov. suiting	36⅜,	45	16 37
2055	1 bl'k cashmere	29,	47–2	28 03
B 50	1 novelty, 34 m	36⅝,	40	14 73
B 40	2 novelty, m. 34–33	72 1⅙,	50	36 30
O 15	1 bl'k serge, m. 33	35–3,	35	12 54
BB	1 bl'k serge	35,	45	15 75

650....	1 bl'k surge.....	27,	50.....	18	63
Gransl.	2 pl'd surge.....	22,	75.....	16	50
D 40...	4 4 om. henrietta.....	1678,	55	91	93
160....	3 " "	1161,	65.....	75	56
480....	1 bull. tamise.	54,	45.....	24	30
10.....	1 albatross.....	567,	40.....	23	75
CC.....	1 4 bn. sho. henrietta.....	49,	72.....	35	98
RR.....	1 " "	16⅜,	65.....	36	64
Z.....	1 " "	462,	1.00.....	46	50
Y.....	1 " "	452,	80.....	36	40
210....	1 bl'k almo.....	35⅛,	75.....	26	34
Yo.....	1 mohair.....	54,	32.....	17	55

$597 76

Exhibit No. 2. S. A. Emanuel, notary, &c.

59 NEW YORK, *Aug.* 29, 1890.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book E 3, folio 103.
Terms, 4 months' credit for notes payable at bank with exchange.
Nov. 1st.
Shipped in packages, No. 1810.

%						
5.....	10/4	Meddlesex bl'k'ts.....	.70.....	3	50
5.....	"	Genesla "	.90.....	4	50
5.....	"	Durham "	1.25.....	6	25
5.....	"	Windsor "	1.75.....	8	75
5.....	"	Regent "	2.25.....	11	25
5.....	"	Waterville "	3.50.....	12	50
5.....	"	Yosemite "	3.00.....	15	00
5.....	"	Montreal "	3.25.....	16	25
5.....	11/4	Montreal "	4.00.....	20	00
3	"	Cal. Mof. S. "	5.25.....	15	75
3.....	12/4	" " "	6.25.....	18	75
3.....	1¼	Perfection "	7.25.....	21	75
5.....	10/4	Amoreked "	2.00.....	10	00
5.....	"	Loreetto "	2.50.....	12	50
5.....	"	Coronet "	3.00.....	15	00
3.....	11/4	Red Lilly "	4.25.....	12	75
10.....	11/4	S.G. Bro. grey "	.55.....	5	50
5.....	"	Suffolk "	.70.....	3	50
5.....	10/4	Thistle "	.90.....	4	50
5.....	"	Reg Camp "	1.12.....	5	63
5.....	"	Calep "	1.50.....	7	50

5.....	10/4 Monop-le	bl'k'ts.....	2.00.....	10 00
5.	" Henrietta	"	2.50.....	12 50
2.....	11/4 Kearsage	"	4.00...	8 00
2.....	5 lb. Arizona	"	4.50.... ...	9 00
2.....	7 lb. "	"	5.50.....	11 00
367.....	1 Kinmore skirting flannel...		31.15.....	4 69
362.....	1 Dvmet. skirting flannel....		36.15.....	5 48
66.....	1¾ Dvmet. skirting flannel...		37.06.....	2 22
1.....	2¾ white flannel...		671132.....	9 08
2...	1¾ " "		37.15...	5 74
12.... ..	2" " "		62 18.....	11 19
46.....	1" " "		33 35.....	11 73
18..... .	1" " "		31 30	9 45
50.....	2" " "		73 25...	18 38
51.....	1" " "		42 20... ...	8 50
½.....	1" " "		312 30.....	9 45
Bv.....	17 8 sawrp. "	... .	282 75...	21 38
41... ...	1 white "	.....	28 32.....	9 10
4.....	1 Gilbert "	....	333 42.....	13 07
141.....	1¾ grey "	.....	41 25.....	10 31
192.....	1¾ grey "	.....	293 20.....	5 95
190.. ...	2 Stanley "	.....	57 20.....	11 45
Wambet..	1 grey sh-ker flannel.....		45 20.....	9 10
Dover....	1 grey twill "	.....	472 212..	10 22
Y. & C...	1 grey twill "	... .	193 35...	20 91
Iron	1 grey twill "	.....	54 17.....	9 18
823.....	1 " " "	.....	712 122.....	8 94
351.....	1 blue " "	.....	512 18...	9 27
606.....	1 " " "	....	72 25... ...	18 00
West W..	1 red mixed "	.....	62 17	10 85
270.....	1 " " "	.....	662 27...	18 30
61				
261	1 red mixed flannel.....		47 18.....	8 46
Yol.....	1 " " "	.....	64 35.....	22 40
(8.)... ..	1 " " "	....	612 22.....	13 53
10 ct.....	1 shaker "	.....	38 21.....	7 98
129.....	1 " "	.....	312 30.....	9 45
				$625 39

Exhibit No. 3. S. A. Emanuel, notary, &c.

62 NEW YORK, *Aug.* 30, 1890.

Mes. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book E 10, folio 87.
As Nov. 1, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 2158.

	3 p. rock *selisia*	162,	10.....		16 20
75.....	1 f'cy satine.....	38,	15.....		5 70
2609...	1 " "	361,	18.....		6 53
	1 Landsdale *selisia*.....	33,	22.....		7 42
17.....	2 8/4 felt.....	10,	95.....		9 50
					45 35

Exhibit No. 4. S. A. Emanuel, notary, &c.

63 NEW YORK, *Sept.* 1, 1890.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book F 31, folio, 186.
Terms, 4 months' credit for notes payable at bank with exchange.
Nov. 1.
Shipped in packages, No. 200.

22... ..	5 pce. cot. diaper..... ...		60....	3 00
110.....	1 1/12 damask sett.....	3	50....	3 50
341.....	1 damask cloth.....			3 50
250.....	1 10/14 damask cloth.....			4 00
575.....	1 10/12 " sett...			8 00
	1 8 1/4 " "			9 00
910/87...	6 only " cloth.....	1	12....	6 75
5 &.....	1 8/10 cardinal cover.....	1	50....	1 50
	1 1/4 T. red "			75
	1 8/4 " "			1 00
	1 8/10 " "			1 35
	1 8/12 " "			1 65
59.....	1 8/14 damask "			2 50
	5 8/10 " "	2	00....	10 00
	7 8/12 " "	2	25....	15 75
55.....	1 " setts.....			4 50
5701....	1 " "			6 00
66.....	4 dz. huck towels.....	1	55....	5 40
77.....	4 " "	1	50....	6 00
235.....	2 " "	2	00....	4 00
1000....	1 " "	2	50....	2 50
245.....	1 " "	2	12-2..	4 25

64

935	1	huck towels				4 50
575	1	damask "				3 25
100	4	" "			1 25	5 00
120	4	" "			1 75	7 00
70	2	" "			1 35	2 70
60	2	" "			1 12/2	2 25
40	2	" "			90	1 80
1530	1	dz. damask towels				2 75
500	2	" "			2 00	4 00
755	1	" "				4 50
685	1	" "				6 00
675	1	" "				4 50
660	1	" "				3 75
740	½	" "			9 00	4 50
55/5	1	" doylies				1 40
75/286	1	" "				1 38
120	2	" "			65	1 30
8	2	" "			40	80
14	1	" "				70
40	1	" "				1 00
115	1	" "				90
K	7	" "			87/2	6 13
341	1	" napkins				3 50
250	1	" "				3 00
180	1	damask napkins				1 50
131	1	" "				80
185	2	" "			1 00	2 00
285	2	" "			2 50	5 00
30	5	" "			65	3 25
40	5	" "			85	4 25
237	5	" "			1 25	6 25
137	5	" "			1 00	5 00

65

150	5	damask napkins			2 75	13 75
130	5	" "			2 25	11 25
90	5	" "			1 40	7 00
110	5	" "			1 75	8 75
30	2	elite lining			70	1 40
O	1	" facing	40,	15		6 00
B	3	" "	120,	13		16 20
5	1	butcher linen	21,	25		5 25
2	1	blch. crash	80,	08		6 40
318	1	Puritan crash	40,	10		4 00
45	1	glass cloth	49,	10		4 95
120	1	pk	63,	07/2		4 73
130	1	blch. damask	37,	30		11 25
119	1	" "	37,	42		15 94
155	1	" "	42,	50		21 00

210.....	1 pce. blch. damask.....	21,	85....	17	85
150.....	1 " "	24,	50....	12	00
185.....	1 " "	41,	75....	30	94
79.....	1 loom dice.....	50,	19....	9	50
48.....	1 loom damask.....	41,	40....	16	50
77.....	1 " dice.....	42,	16....	7	01
38.....	1 loom damask.....	46,	35....	16	27
10.....	1 T. red damask.....	27,	20....	5	50
Bates...	1 " "	25,	37....	9	57
15.....	1 " "	27,	35....	9	63
				481	79

Exhibit No. 5. S. A. Emanuel, notary, &c.

66 NEW YORK, *Sept.* 3, 1890.

Mess. J. R. Holloway & Co., Fort Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book f 57, folio 25.
Nov. 1, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 403.

72 B.....	1 dz.	mits.....	.....	2	25
1092.....	¼ "	skirts.....	9 00....	2	25
1065.....	⅙ "	"	18 00....	3	00
1993.....	1/12 "	"	18 00....	1	50
147.....	½ "	hoods	1 75....		88
L 37	½ "	"	2 25....	1	12
242.....	½ "	"	4 00....	2	00
11100.....	¼ "	"	6 00. .	1	50
B	½ "	ladies' hose.....	18 00....	9	00
2819/10	"	"		9	00
44927.....	1½ "	"	4 50....	6	75
2925.	1½ "	"	3 50....	5	25
1129.....	1½ "	"	4 50....	6	75
1128 B.....	1½ "	"	6 00....	9	00
4821.....	3 "	"	2 25....	6	75
7803/26 ...	1 "	"		8	50
45¼.....	1 "	"			85
1001.....	2 "	"	75....	1	50
1811/2	1 "	half hose		4	50
13600/37	2 "	"	2 50. .	5	00
3817/5	½ "	misses' hose... ...	2 25....	1	13
5.....	½ "	"	2 50....	1	25
6.....	½ "	"	2 75 ...	1	37
6.....	½ "	"	3 00....	1	50

67

7	1/8	dz.	misses' hose	3	25	1 63
7	1/8	"	"	3	50	1 75
8	1/8	"	"	3	75	1 87
8	1/8	"	"	4	00	2 00
9	1/8	"	"	4	25	2 13
17 11¾	1/8	"	"	3	25	1 62
4	1/8	"	"	3	50	1 75
5	1/8	"	"	3	75	1 88
5	1/8	"	"	4	00	2 00
6	1/8	"	"	4	25	2 12
6	1/8	"	"	4	50	2 25
1706 2/6	1/8	"	"	4	25	2 13
6	1/8	"	"	4	50	2 25
7	1/8	"	"	4	75	2 37
7	1/8	"	"	5	00	2 50
8	1/8	"	"	5	25	2 63
8	1/8	"	"	5	50	2 75
115 B	3½	"	"	2	50	8 75
218	2	"	"	1	00	2 00
233	2	"	"		95	1 90
104 B	2½	"	"	2	40	6 00
110 B	6	"	"	1	12	6 75
(D)	¼	"	dress shirts	12	00	3 00
(E)	¼	"	"	12	00	3 00
125/20	¼	"	vests "	3	00	1 50
22	¼	"	"	3	50	1 75
24	¼	"	"	4	00	2 00
26	¼	"	"	4	50	2 25
503/16	¼	"	"	1	25	62
22	¼	"	"	2	00	1 00
24½	¼	"	"	2	25	1 13
28	¼	"	"	2	50	1 23
28	¼	"	"	2	75	1 37

68

30	¼	dz.	vests shirts	3	00	1 50
200/20	¼	"	"	2	75	1 38
22	¼	"	"	3	00	1 50
26	¼	"	"	3	50	1 75
28	¼	"	"	3	75	1 87
30	¼	"	"	4	00	2 00
300 P/20	¼	"	pants "	2	75	1 38
24	¼	"	"	3	25	1 62
22	¼	"	"	3	00	1 50
24	¼	"	"	3	25	1 63
26	¼	"	"	3	50	1 75
300 P/28	¼	"	"	3	75	1 87
30	¼	"	"	4	00	2 00
19/12	1	"	vests			3 75

476	1½ dz.	vests	6 00		9 00
975	1 "	"			8 00
974	1½ "	"	4 50		6 75
967	½ "	"	12 00		6 00
1000/200	1 "	"			4 25
957	1 "	"			12 00
961	1 "	"			12 00
522	¼ "	fa-cinators	10 50		2 63
517	¼ "	"	7 50		1 87
556	¼ "	"	9 00		2 25
1418	⅓ "	"	9 00		3 00
557 C	1 "	"	2 00		2 00
504	½ "	"	4 25		2 13
514 F	½ "	"	6 50		3 25
					$273 13

Exhibit No. 6. S. A. Emanuel, notary, &c.

69

NEW YORK, *Sept. 3rd*, 1890.

Mess. J. R. Holloway & Co., Fort Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 57, folio 28.
Nov. 3, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 404.

150/26	⅙ dz.	shirts	6 75		1 13

Exhibit No. 7. S. A. Emanuel, notary, &c.

70

NEW YORK, *Sep.* 3, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Tex.,, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book f 57, folio 44.
As Nov. 2, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 425.

SS	1	scrum cloth	54,	3½		2 02
	1 "	"	64½,	13½		8 71
205	1	4/4 crape	14,	65		9 10
	1	drapery	55,	8		4 40
324	1 "		24,	17½		4 20
328/3	1 "		24,	17½		4 20
276	1 "		25,	17½		4 38
328	4 "		24,	17½		4 20

101	1 flouncing	29/1,	45	13	16
84	1 Hamburg edging	18,	12½	2	25
60	1 " "	18,	8	1	44
40	1 " "	27,	6	1	62
248	1 " "	27,	6	1	62
101	1 " "	9,	20	1	80
164	1 " "	13½,	20	2	70
73	1 " "	18,	10	1	80
278	1 " "	22½,	10	2	25
316	1 " "	18,	15	2	70
95	1 " "	9,	15	1	35
176/1914	1 thir. lubby	3,	30		90
7916	1 lace	3,	65	1	35
791½	1 "	3,	35	1	05
319/3567	1 "	2,	15	3	00

71

319/1065	1 lace	2,	90	1	80
304/3207	1 "	2 dz.,	13½	2	75
381/2699	½ Spanish lace	24,	25	6	00
136	1 Torchon lace	68,	62	2	16
184	1 " "	68,	6	2	88
0360	1 " "	48,	3	1	44
0615	1 " "	48,	82	4	08
173	1 " "	36,	6	2	06
66	2 barege	55¾,	18	10	00
128	2 dot net	51/1,	12½	6	41
2976/1	1 ruching			1	85
2983/6	1 "			2	25
2976	1 "			1	85
27	1 dz. ¾ H.S. handkerchief			2	25
1015	1 " " "			5	50
8628	1 " " "			2	50
8577	1 " " "			3	00
27	1 " " "			3	00
700	1 " " "			2	25
1004	1 " " "			4	00
1011	1 " " "			4	75
Job	1 embroidered "			6	00
	2 H. stitched "			3	00
1320	5 " " "		75	3	75
451 &	2 " " "		1 00	2	00
10	3 dusters		30		90
20	2 "		65		90
C	2 "		75	1	50
218	10 pr't'd hdkfs		25	2	50
1063	20 " "		12½	2	50
33	¼ comforts	13	50	6	75

72

35	½ comforts	15	00	7	50

3000	⅓ kid gloves	15 00	5 00
7001	6/12 " "	12 00	6 00
5 H	2½ Alex. kid gloves	12 50	33 75
5	2/12 " " "	12 50	31 25
½	½ " " "	15 00	22 50
	2 measure no charg.		
O	2 capes	1 25	2 50
1110	3 blazers	3 50	10 50
201	6 jackets	1 25	7 50
400	½ skirts	10 50	5 25
	1 Alice		4 50
89	½ dz. Alie sk'ts	7 50	3 75
60	½ " " "	9 00	4 50
	4 corers	75	3 00
42	1/12 lambrequ-ns	12 00	1 00
30	2/12 "	6 00	1 00
34	1/12 "	9 00	75
	3 atlas maps	50	1 50
	3 Idaho maps	62½	1 88
87	3 beam shawls	1 00	3 00
	3 Cortland shawls	1 50	4 50
	2 zeph-r "	2 00	4 00
	3 Franklin "	87/2	2 63
	3 cashmere "	2 50	7 50
			358 14

Exhibit No. 8. S. A. Emanuel, notary, &c.

73

NEW YORK, *Sep.* 3, 1890.

Mess. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book # E 57, folio 48.
As Nov. 2, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 430.

63	¼ dz. comforts	29 00	7 25
69	¼ " "	30 00	7 50
57	¼ " "	25 00	6 25
53	¼ " "	23 00	5 75
47	¼ " "	20 00	5 00
			31 75

Exhibit No. 9. S. A. Emanuel, notary, &c.

74 NEW YORK, *Sept.* 4, 1891.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book f 44, folio 308.
Nov. 4.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 137.

13	⅙ dz.	dusters	5 25		88
	1	Sb. E. tape			90
22	1	920 Fletcher laces			75
	1	Milve needles			1 50
S 24	1	920 lost buttons			45
S 30	1	" "			60
999 s/18	1	supple buttons	1 24		
20	1	" "	1 43		
22	1	" "	1 64		
66/18	1	½ fine "	81		
20	1	" "	94		
22	1	" "	1 06		
			7 12		
		15 %	1 07		
				6	05
153	1	crochet buttons		1	75
15/42	1	" "		1	50
101/5	1	" "		1	50
1223	1	glass "		1	15
879	1	" "			60
1188	1	" "			50
835	1	" "		1	15
181	1	tags			30
820	1 dz.	hairpins			75
0193	1	"			75
194	¼	"	4 50	1	13

75

59	¼ dz.	hairpins	2 50		62
900	1	"		1	25
40/4	¼	cloak clasps	4 50	1	12
425	⅓	slides	6 25	2	08
300/12	½ dz.	slides	2 75		92
475/12	⅓	"	4 25	1	42
695	¼	"	3 50		87
2359/4	¼	"	2 25		56
15	¼	"	2 50		63
1280/5	½	"	2 75	1	37

427	1/4	buckles	2 00		50
486	3/4	"	1 75		1 31
2584/10	1/3	"	4 50		1 50
4598	1/2	"	3 25		1 62
4602	1/2	"	4 50		2 25
300/10	5/12	"	2 25		94
300/8	1/2	"	1 75		87
321/8	1/2	"	2 50		1 25
310	1/3	slides	9 00		3 00
200/8	1/2	buckles	1 50		75
175/12	1/3	"	1 75		58
4450	1	"	1 75		1 75
4594	1	"			1 75
6	1/4	"	5 00		1 25
350/8	1/2	"	3 25		1 63
100/12	1/3	"	2 50		83
201/9	1/3	"	3 75		1 25
1384/10	1/3	"	4 50		1 50
4/11/44	1/3	"	2 00		67
751	1/6	G. & S. beads	3 50		58
	1/6	necklaces	7 50		1 25
450	1/3	W. B. casing	2 25		75

76

C 444	1	gathering			1 75
2099/1	1	loop b'd			20
3	1/4	elastic cord	1 10		28
40	1/4	silk "	2 50		62
13	1/12	Vienna b'd	3 75		31
16	1/4	Dolabel b'd	8 00		2 00
	2	Climax *price*	75		1 50
3/4	1	elastic piece			34
3/4	1/4	gro. elastic web	5 58		1 39
158	1	toe " "			40
3/4	2	silk " "	1 50		3 00
	2	H. C. B. web	90		1 80
150	2	dress belting	19		38
3480/1	1	st. braid			1 40
1052	1	" "			1 75
2099/3	3	loop braid	10		30
10	1	Gem gaiters			1 50
	2	India tape	45		90
	4	Taxter cotton	40		1 60
	1	Neflower soap			71
	11	Goff's b'd	52		5 58
	1	T. B. soap			40
	1	P. blow soap			75
	1	maple "			42
3	1	ruby shields			1 85
1	2	Canfield shields	2 08		4 16
2	2	" "	2 50		5 00

3	1	Canfield shields			2 92
2	2	Doid "		1 25	2 50
207	1	beets			2 25
204	1	"			2 25
5	1	D. B. steel			65
77					
F	1	L'say hose supp'ts			2 25
9	1	" " "			2 06
	1	Park Ave. collars			1 25
	1	Pearl cuffs			2 10
1096	⅛	bags	9 00		1 50
1687	⅛	"	9 00		1 50
1434	⅛	"	12 00		2 00
375	½	tags	1 00		50
10	½	99 Neems' h. & eyes	3 60		1 20
10	⅛	" " p't'd "	4 50		75
5	1	Pyramid pin			70
	2	b-x jet pins	25		50
	1	Turney pins			75
	⅛	toilet "	4 80		80
130/4/0	1	hat "			63
105	1	Cob hair "			75
	1	vail "			38
150	½	" "	2 25		1 12
me	4	N. P. U. "	44		1 76
	¼	book "	6 00		1 50
	3	lb. Melio hairpins	24		72
9	⅛	1 rubber "	9 50		1 58
	1	Geet "			1 00
805	1	" "			1 50
	1	K. B. & Co. "			75
447	1	Havou "			2 00
	1	Hosl "			1 00
	1	Nillie corset			15 00
	3	thread	88		2 64
5/10/8	1	Blonde's dboul			88
8	1	Margarite "			73
9	2	" "	88		1 76
10	2	" "	1 04		2 08
78					
9	1	buff blds. dboul			1 06
220/26	3	umbrella-	2 50		7 50
28	3	"	3 00		9 00
5	1	sov. ribbon			1 35
7	1	" "			1 75
9	1	" "			2 25
3½	2	G. F. velvet rib	1 20	2 40	
4½	2	" "	1 50	3 00	
5½	2	" "	1 80	3 60	

9.....	1	G. F. velvet rib.....		3 00	
11.....	1	" "		3 60	
				15 60	
		35 %.....		5 46	
					10 14
570.....	1	gimp, ½	8 00.....		4 00
2603.....	1	"			6 50
2600... ..	1	pd. gimp, 1 dz.....	4 25.....		6 37
1561.....	1	" "			7 00
2427/1.....	1	" "			6 50
2421/3.....	1	" ½..... ...	9 00.....		4 50
	1	Windsor ties...			2 00
966.....	1	" "			33
608.... ..	1	" "			50
3583.....	$\frac{5}{12}$	" "	2 00.....		83
612/1.....	1	handk'fs.....			4 50
7969.....	$\frac{1}{12}$	"	8 00.....		67
9880	$\frac{1}{12}$	"	7 25.....		60
8969.....	$\frac{1}{12}$	"	8 00.....		67
9816.....	$\frac{1}{6}$	"	7 75.....		1 27
9816.....	$\frac{1}{6}$	"	7 75...		1 29
8969... ..	$\frac{1}{12}$	"	8 00...		68
6075.....	$\frac{1}{12}$	"	7 50.....		62
7912	$\frac{1}{12}$	"	9 00...		75
79					
8969... ..	$\frac{1}{12}$	silk handk'fs.....	8 00.... ...		67
9816.....	$\frac{1}{12}$	"	7 75.....		65
1120.. ...	1	"			4 00
					260 20

Exhibit No. 10. S. A. Emanuel, notary, &c.

80 NEW YORK, *Sep.* 3, 1890.

M. J. R. Holloway & Co., Fort Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book E 1, folio 169.
Nov. 3.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 186 C.

2099.....	1	moire silk.....	10,	85....		8 50
2042.....	1	motive "	20,	1 00....		20 00
2383.....	4	col. India silk.....	80,	80....		64 00
1860...	1	bl'k surah "	64⅛,	50....		32 06
2315.....	1	42 "	52½,	25....		13 12

2041	1 motive silk	20,	1 00		20 00
2082	1 " A 47 "	59 1/10,	70		41 37
2039	1 " " "	20,	1 00		20 00
2333	6 pl'd surah "	60,	85		51 00
1627	6 duchess "	120,	1 10		132 00
2018	9 D. V. cord "	176 1/8,	85		149 70
2011	1 bl'k armure silk	62 1/7,	85		53 45
2377	1 bl'k grosgrain silk	81,	75		60 90
2366	1 " " "	73 1/3,	1 00		73 75
2308	5 brocade "	50,	1 15		57 50
2389	2 surah silk A 17 20	41 6/10,	1 25		52 00
2310	2 brocade silk	10,	2 00		20 00
1609	1 sail silk	20,	2 00		40 00
2024	1 "	62 1/5,	1 50		93 92
2021	1 "	62,	1 00		62 75
2022	1 "	59 1/5,	1 25		74 53
2313	3 brocade 4 ds. 5 a 5 7	17 3/10,	3 50		60 75

81

2048	6 bl'k velvet	129 1/8,	1 35		174 30
2070	1 " "	20 3/5,	2 00		40 75
1865	" "	18 1/5,	75		13 69
2058	1 " "	22 1/5,	85		79 23
2060	1 " "	20 1/8,	1 15		20 12
					1,472 37

Exhibit No. 11. S. A. Emanuel, notary, &c.

82 Hotel Grace; E. Grace, prop.

CHICAGO, 4, 6, 1890.

Friend Dutcher, New York, N. Y.

DEAR SIR: When I was there I selected a few aprons and aimed to bring them with me, but forgot them. Will you please send by ex. to Eldorado, and oblige,

Yours truly, J. R. HOLLOWAY.

Sent to Fort Worth, Sep. 8, '91.

83 NEW YORK, *Sep.* 8, 1891.

M. J. R. Holloway & Co., Fort Worth, Tex., bought of Dunham, Buckley & Co., importers and jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book f 31, folio 285.
Nov. 8.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 262.

1/2 dz.	Magnolia coffee spoons & engr	2 50			1 25
1	Counten teaspoons and engraving				4 00
					5 25

Exhibit No. 12. S. A. Emanuel, notary, &c.

84 The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated night messages, sent at reduced rates, beyond a sum equal to ten times the amount paid for transmission, nor in any case when the claim is not presented in writing within thirty days after sending the message.

This is an unrepeated night message, and is delivered by request of the sender under the conditions named above.

NORVIN GREEN, *President.*

THOS. T. ECKERT, *General Manager.*

12 a. m. 3967.

Number.	Sent by—	Rec'd by—	Check.	
D 84 A	Bi	Z 5	10 pd.	nm.

Received at the Western Union building, 195 Broadway, N. Y., Sep. 22, 1890.

Dated Ft. Worth, Tex., 22.

To John T. Dutcher, care Dunham, Buckley & Co., 340 B'way, N. Y.:

Send ex. six wool combination suits, eight to twenty dollars.

J. R. HOLLOWAY.

1/10.00.
2/9.00.
3/11.00.

85 NEW YORK, *Sep.* 23, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 6, folio E 12.
As Nov. 23.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 1554.

P 63.....	2 robes.....	9 00.....	18 00
81.....	2 "	11 00.....	22 00
604.....	1 "		14 00
603.....	1 "		14 00
			68 00

Exhibit No. 13. S. A. Emanuel, notary, &c.

86 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 10, 16, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTLEMEN: Please send us by ex.—

1 dz. bl. Mosquetair- kids, worth..... $15 00
2/5, 3 2/6, 3/6, 1 3/6, 3 2/6, 3 ..... "
1 dz. tan Mosquetair-, same sizes..... "
½ dz. opera shades, Mosquetair-, same sizes..... "
5 pc. bl'k gg. satin-edge ribbon.....
1/9, # 1/2, 1/16, 1/22, 1/40.
2 cardinal, 1/9, 1/12, 1/16.

And oblige yours truly, J. R. HOLLOWAY.

Sturgess.
Bennett.
12 but., 24.00, white only.

87 NEW YORK, *Oct.* 20, 1890.

M-. J. R. Holloway & Co., Fort Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book 51, folio 577.
December 20.
Terms, 4 months' credit with notes payable at bank with exchange.
Shipped in packages, No. 256.

19.....	2 pirate ribbon.....	93½.....		1 87
12.....	2 " "	1 21		2 42
16.....	2 " "	1 48½.....		2 97
22.....	1 " "	.....		2 00
40	1 M. Hill "	.....		3 25
86.....	2 dz. Suede kid gloves.....	15 00		30 00
				42 51

Exhibit No. 14. S. A. Emanuel, notary, &c.

88 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 10, 20, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTLEMEN: Please send us by ex.—

5 H 2½ Z kids, brown and tans.
4/6, 4/6, 1 6/6, 2 6/6, 3 4/7, 3/7, 1 3/7, 2 A, 9.00.
5 H bl'k kid*d* 1/6, 1/6, 1 2/6, 2 2/6, 2 2/6, 3 2/7, 2/7, 1 2/72.
1 Z binding ribbon, bl'k, red, & yellow.

$\frac{1}{4}$ Z $\frac{5}{16}$ bl'k bone casing.
$\frac{1}{12}$ Y pocket scissors, 4 in.
And oblige yours truly, J. R. HOLLOWAY.

Sturgess.
Bull. McEwen.

89 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 10, 20, 1890.

J. T. Dutcher, Esq., New York.

DEAR SIR: We send you today an order for some more kids. Please tell Mr. Sturgess that we want something to sell for 1.00, and do not want to pay over 9.00; would like something for less than that if we could get something, but it must be hook, and ask him what he has in a kid for 5½ or 6.00, in button.

Yours truly, J. R. HOLLOWAY.

Send samples.

90 NEW YORK, *Oct.* 24, 1890.

M-. J. R. Holloway & Co., Fort Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 39, folio 297.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 281.

5 h.....	3½ dz.	Imogene kid gloves.....	9 50....	33	25
4 B.....	½	moire " "	5 50....	2	75
5 B.....	½	Patti " "	6 50....	3	25
1040....	$\frac{1}{12}$	scissors.....	5 50....		46
	¼	gr. W. B. casing.....	2 25....		50
2.....12		taffety ribbon.....	11½...	1	38
				41	65

Exhibit No. 15. S. A. Emanuel, notary, &c.

91 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 10, 23, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by ex.—
5 H 1 dz. bl'k undressed kids, 3/6, 3/6, 1 3/6, 2 3/6, 3.
5 H 1 dz. grey undressed kids, 3/6, 3/6, 1 3/6, 2 3/6, 3.
5 H 1 dz. tan undressed kids, 4/6, 3/6, 1 3/6, 2 2/6, 3.
Worth 13.50 to 15.00, and brand Alexander.
And oblige yours truly. J. R. HOLLOWAY — CO.

Bedell.

92 NEW YORK, *Oct.* 27, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book f 61, folio 182.
As Dec. 27, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 215.

7 N..... 3 Alex. Suede kid gloves..... 15 00..... 45 00

Exhibit No. 16. S. A. Esamuel, notary, &c.

93 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 10, 27, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please ship us by freight—
2 pieces Lonsdale cambric, 1 & 2.
1 piece Nankeg satine drill, bl.
1 " " " " " slate.
1 " A. C. A. tick.
1 " light blue cambric, sample.
1 " pink shell "
1 " cream dress flannel, 36 in. @ 50c.
1 " cream cashmere, worth 38 to 42c.
1 small piece pink albatross, col. same of ribbon.
1 pc. bl'k cashmere, worth 25c.
1 pc. bl'k surge, 35c.
1 pc. dark grey janes, worth 28 to 30.
1 pc. bl'k silk velvet, worth 65 to 75c.
1 pc., 20 yds., cream surrah, 50 to 55c.
135 ½ dz. pants em. 20, 22, 24, 26, gray, to match the vests you sent us in Sep.
961 1 dz. en. ladies' jersey white wool vests and pants @ 12.00.
1 roubt. children's French ribbed black wool hose, 5 to 8½, worth 3 to 3.50.
And oblige yours truly, J. R. HOLLOWAY & CO.

94 P. S.—Send 10 P. black grosgrain & ribbon satin edge, 2/9, 2/12, 2/16, 2/22, and 2/40.
Lawm.
Budd.
Cungham.
Bennett.
Hunter.
Freeman.

95 NEW YORK, *Oct.* 31, 1890.

Mr. J. R. Holloway & Co., Fort Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book f 58, folio 408.
As Dec. 31, '90.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 141.

9.....	2 M. hett. ribbon.....	1 26.....	2 52
12.	2 " "	1 61.....	3 22
16.....	2 " "	1 96.....	3 92
22	2 " "	2 50.....	5 00
40.....	1 " "		3 25
135 20.....	½ doz. pants.....	3 00.....	1 50
22.....	½ " "	3 50.....	1 75
24.....	½ " "	4 00...	2 00
920.....	4 " chds. hose...	3 00.....	12 00
961.....	2 " vests and pants.....	12 00...	24 00
			59 16

Exhibit No. 17. S. A. Emanuel, notary, &c.

96 NEW YORK, *Nov.* 1, 1890.

M. J. R. Holloway & Co., Ft. Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 13, folio 447.
Dec. 31.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 940.

	St. Mch. jean.....	50¼, 28....	14 21
2087....	1 surrah..	20, 50....	10 00
2416....	1 velvet	25½, 65....	15 36
			39 57

Exhibit No. 18. S. A. Emanuel, notary, &c.

97 NEW YORK, *Nov.* 1, 1891.

M-. J. R. Holloway & Co., Ft. Worth, Tex., bought of Dunham, Buckley & Co., importers and jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book E 13, folio 447.
60 day-, Dec. 31.
Terms cash.
Shipped in packages, No. 940.

D.....	1 henrietta.....	57/1, 25....	14	31
	5%.....			71
			13	60
B.....	1 serge.....	45, 35....	15	75
J.....	1 at 1 5/4 cash..	50, 42½...	21	25
180. . .	1 albatross.....	491, 42½...	20	93
	1 Lonsdale cdt...	66, 10....	6	60
	1 "	57, 9 ...	5	13
	2 Alex. "	102/3, 4⅛...	4	24
	2 Nainky jean.....	95, 7/1....	6	89
	1 Amos aia yuk.....	47, 12½...	5	94
			100	33

Exhibit No. 19. S. A. Emanuel, notary, &c.

98 NEW YORK, *Nov.* 3, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 61, folio 222.
As Jan. 3, '91.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 229.

35..... 1 B. comforts..... 15 00

Exhibit No. 20. S. A. Emanuel, notary, &c.

99 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 10, 29, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTLEMEN: Please ship us by freight 23 1 dz. comforts @ 13.50. 35 1 dz. comforts @ 15.00.

And oblige yours truly, J. R. HOLLOWAY & CO.

Van.

100 NEW YORK, *Nov.* 6, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 2, folio 354.
60 days, Jan. 7, '91.
Shipped in packages, No. 1803.

S B..... 1 5/4 suiting... .. .... 33, 42½.... 14 03

Exhibit No. 21. S. A. Emanuel, notary, &c.

101 NEW YORK, *Nov.* 7, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 58, folio 435.
Jan. 7.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 128.

31..... 1 dz. comforts..... 13 50
135/26..... ½ pants..... 4 50.... 2 25

15 75

9 pc. ribbon chg. Oct. 31 packed in.

Exhibit No. 22. S. A. Emanuel, notary, &c.

102 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 11, 1, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTLEMEN: Please send us by ex.—
5 H dz. bl'k dressed kids, 4/5, 3 4/6, 4/6, 1 @ 13.50.
10 H 1½ dz. " " 6½, @ Alende.
10 H 1½ dz. light tan kids, 6½, Alende.
1 dz. bl'k Mosquetaire 4/5, 3 4/6, 4/6, 1, 15.00.
1 dz. tan " 4/5, 3 4/6, 4/6, 1.
1½ dz. green " 5½, a little lighter than sample of plush.

And oblige yours truly, J. R. HOLLOWAY & CO.

Sturgess.

P. S.—The black kids you sent us at 9.50 were awful hard. How are the Elbern now? We think we will have to return the most of them.

103 NEW YORK, *Nov.* 7, 1890.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 58, folio 470.
Jan. 5.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 452.

5 H.....	1 dz.	Fanchon kid gloves....	13 50.....		13 50
8 B.....	2	Alex. " "	15 00...		30 00
10 B.....	½	kid " .. .	15 00.....		1 25
71 & K...	½	" "	15 00.....		1 25
					46 00

Exhibit No. 23. S. A. Emanuel, notary, &c.

104 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 11, 5, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by ex.—
3 plush jackets, # 4926, 1/32, 1/34, 1/36.
2 Astrachan caps, 1/40, 1/42, # B, at 1.25.
1 pc. gray belting.
1 " bl'k belting.
And oblige yours truly, J. R. HOLLOWAY & CO.

Leech. Bull.
P. S.—1 gross bl'k tailor dress buttons, 22 tins.

105 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 11, 7, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by express—
D 15. 1 piece bla-k velveteen at 30c.
1 piece bl'k feather trimming, worth 15.00 to $16.50.
6 yds " " " " 21.00 to $24.00.
And oblige yours truly, J. R. HOLLOWAY & CO.

Hunter.
McEwen.

106 NEW YORK, *Nov.* 11, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book C 95, folio 231.
As June 11, '91.
Term-, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 995.

5.....	1 Vulcan v'teen.....	$33\frac{1}{2}$, 30		10 05

Exhibit No. 24. S. A. Emanuel, notary, &c.

107 NEW YORK, *Nov.* 11, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 71, folio 44.
As Jan. 11, '91.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 425.

4926.....	3 P. jacket-	8 00.....	24 00	
B	2 capes.....	1 25.. ...	2 50	
X1/W.	1 gr. taylor buttons.....		55	
	$\frac{1}{6}$ D. M. belting.....	2 25.....	38	
2560...	1 feather trimming, $\frac{1}{2}$	24 00.....	12 00	
	1 " " $11\frac{1}{2}$ yds....	16 50 dz....	15 82	
				55 25

Exhibit No. 25. S. A. Emanuel, notary, &c.

108 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 11, 20, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTLEMEN: Please send us by express—
B 1 Astrachan cape, size 46, at 1.25.
171 1 plush & velvet cape, size 40, at 5.00.
5 H $\frac{1}{4}$ dz. $5\frac{3}{4}$ gray undressed kids.
1 doz. as tans Mosquetair- kids, 15.00, 3/6, 6/6, 2 3/6, 3/4, undressed.
And oblige yours truly, J. R. HOLLOWAY & CO.

P. S.—Send 6 pc. $\frac{5}{16}$ black bone casing.

Leech.
Bull.
Stevens.
Leech.

109 NEW YORK, *Nov.* 25, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book f 71, folio 97.
As Jan. 26, '91.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 326.

19 x.....	1 jacket	....	....	5 00
450..	½ gr. W. B. casing.....	2 25....		1 13
8 B.....	1 dz. Alex. Suede kid gloves....	.....		15 00
7 H.....	¼ pairs Suede kid gloves.....	12 00....		3 00
				24 13

Exhibit No. 26. S. A. Emanuel, notary, &c.

110 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 11, 21, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by freight—

5 pr. 10/4 thistle gray	blankets.....	90
5 " 10/4 Suffolk "	"	70
5 " " California camp	"	1 50
5 " " reg. camp	"	1 12½
p " bl'k rock silesin, S.....	.....	10
1 " medium rock slate silesin, S.....	.....	10

2 gross en. 8 & 9 in $\frac{5}{16}$ dress bones.

And oblige yours truly, J. R. HOLLOWAY & Co.

Budda.
Lockwood.
Bull.

111 NEW YORK, *Nov.* 25, 1890.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 18, folio 23.
Jan. 25, '91.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 1333.

1 10/4 thistle	bl'k't, d.....		90....	4 50
1 4 lb. Victoria	"		70....	3 50
5 5 R. star	"		1 10....	5 50
5 6 Subdney	"		1 50....	7 50
2 P. rock sil*istia*.....		104½,	10....	10 45
				31 45

Exhibit No. 27. S. A. Emanuel, notary, &c.

112 NEW YORK, *Nov.* 26, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 52, folio 46.
As Jan. 25, '91.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 226.

8/5/16....	2 gr. dress bone...		73....	1	46
9.....	2 " "		88....	1	76
				3	22

Exhibit No. 28. S. A. Emanuel, notary, &c.

113 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 12, 3, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by express 1¼ silk like sample.
And oblige yours truly, J. R. HOLLOWAY & CO.

Ferre.

114 NEW YORK, *Dec.* 9, 1890.

Mr. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book C 95, folio 366.
As Feb. 9, '91.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 827.

48	1 tinsel.....	1⅛.....	7	25.....	9 06

Exhibit No. 29. S. A. Emanuel, notary, &c.

115 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 12, 5, '90.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by ex.—
6 pc. light blue ggr. ribbon, satin edge, silk.
1/1, 1/2, 1/3, 1/4, 1/5, 1/12.
6 p. light pink, 1/1, 1/2, 1/3, 1/4, 1/5, 1/12, silk.
6 " yellow, 1/1, 1/2, 1/3, 1/4, 1/5, 1/12.

6 " light green, 1/1, 1/2, 1/3, 1/4, 1/5, 1/12.
5 " pumpkin, 1/1, 1/2, 1/3, 1/4, 1/5.
12" binding ribbon—3 blue, 3 pink, 3 yellow, & 3 bl'k, at 6 to 6.50.
1½ ladies' 4 B. tan & brown kids, 3/6, 3/6, 3/6, 2 3/6, 3 2/7, 2/7, 2/7, 2.
½ dz. 4 B. bl'k, 2/6, 1⅔, 2⅔, 3, at 6 to 6.50.
1 dz. ladies' China crape silk kdkp., white as & cream.
1 dz. gents' h. s. " " " as bl'k.

Yours truly, J. R. HOLLOWAY & CO.

116 NEW YORK, *Dec.* 10, 1890.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 69, folio 265.
Feb. 9.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 317.

4 B.....	2 Patti kid gloves.....	6 50	13 00
143.....	1 silk hdkfs.....	.....	10 50
0683.....	1 "	.....	8 00
2.....	12 taffeta ribbon..... ...	12½.....	1 50
1...	5 grossgrain ribbon.....	10	50
2.....	4 Pisa & C. "	37½.... ...	1 50
3..... ...	5 " "	47½.....	2 38
4....	1 "		50
5....	4 "	55	2 20
12.....	4 "	1 21	4 84
			44 84

Exhibit No. 30. S. A. Emanuel, notary, &c.

117 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 12, 10, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by ex.—
2 plush capes, 1/36, 1/38 bust, worth fro*n* 4 to 6.00 dollars, good value.
1 gross black tailor dress button-, 22 line.
And oblige yours truly, J. R. HOLLOWAY & CO.

Bennett borde.
Leech.
Bull.

118 NEW YORK, *Dec.* 15, 1890.

M-. J. R. Holloway & Co., Ft. Worth, Tex., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book E 61, folio 413.
Feb. 15, '9–.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 227.

22.....	1 G. silk buttons.....	1 80.....		55
4.....	3 pc. pirate ribbon.....	50...		1 50
21.....	2 capes.....	5 00.... ...		10 00
				12 05

Exhibit No. 31. S. A. Emanuel, notary, &c.

119 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 12, 23, 1890.

Mess. Dunham, Buckley & Co., New York.

GENTLEMEN: Please send us by ex. 1 plush cape, bust 38, same style as #21 and price, but without the astrachan. Both you sent us the 15th were trimmed in astrachan and would not suit the crank they were ordered for; so if you do not have just what we order, do not send any.

Yours truly, J. R. HOLLOWAY & CO.

McLee.

120 NEW YORK, *Dec.* 31, 1890.

Mr. J. R. Holloway & Co., Fort Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 70, folio 355.
As March 1, '1.
Terms, 4 months' credit for notes payable at bank with exchange
Shipped in packages, No. 176.

15.....	1 cape.....		5 00

Exhibit No. 32. S. A. Emanuel, notary, &c.

121 J. R. Holloway & Co., dealers in dry goods and millinery, 104 Houston street.

FORT WORTH, TEXAS, 1, 26, 1891.

Mess. Dunham, Buckley & Co., New York.

GENTS: Please send us by ex.—

5 pr. Mosquetair- kids, opera length, shoulder, 1/5, 3 1/6, 1/6, 1 1/6, 2 1/6, 3, cream and pink.

1 pr. 6 1 canary.

5 H 1 dz. Alexander glaze kids as tans, 2/5, 3 3/6, 4/6, 1 3/6, 2, at 13.50.

5 H 1 dz., as tans, kids, 2/6, 2/6, 1 3/6, 2 3/6, 3 1/7, 1/7, 1, at 9.50.

5 H 1 dz. bl'k kids, 2/6, Im. 3/6, 2 3/6, 3 2/7, 2/7, 1, at 9.50.

1 gross bl'k tailor buttons, 22 lin-s.

Yours truly, J. R. HOLLOWAY & CO.

Sturgess.
Bull.

122 NEW YORK, *Jan.* 3, 1891.

M-. J. R. Holloway & Co., Ft. Worth, Texas, bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Salesman, Dutcher.
Book F 73, folio 326.
March 30.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 134.

22.....	1 S. B. buttons.....	.....		52
518.....	1 Fanchon kid gloves.....	.....		13 50
518.....	2 Imogene kid gloves.....	9 50.....		19 00
12 B.....	$\frac{1}{2}$ C. Murry " "	..... 24 00.....		2 00
16 B.....	$\frac{5}{6}$ " " "	..... 30 00.....		25 00
				60 02

Exhibit No. 33. S. A. Emanuel, notary, &c.

123 NEW YORK, *March* 7, 1891.

M-. J. R. Holloway & Co., Ft. Worth, Tx., bought of Dunham, Buckley & Co., importers & jobbers of dry goods, No. 340 Broadway.

Duplicate.

Salesman, Dutcher.
Book F 90, folio 76.
May 6.
Terms, 4 months' credit for notes payable at bank with exchange.
Shipped in packages, No. 120.

2.....	7	Pirate ribbon.....	2 45...		2 45
3000/5	1	Fey "	1 10.....		1 10
40.....	2	Phœnix "	2 25.....		4 50

5.....	15	#690 ribbon.....		40.....	6 00
7/16.....	66	" "		80.....	52 80
22	60	" "	1	25.....	75 00
8 B.....	1⅓	Mosq. kid gloves.....	15	00...	20 00
7/8.....	⅔	Suede gloves.....	13	00	8 67
6 B.....	⅔	Bentz "	12	00.....	8 00
4 B.....	½	Suede "	11	00.....	5 50
2253.....	½	dz. mitts.....	5	50...	2 75
459... ...	1	"		.....	2 25
15191.....	1	gloves...			4 00
815.....	1	mitts.....			4 50
131.....	1	"			3 00
2248.....	1	"			1 25
2250.....	1	"			3 00
2251.....	1	"			4 00
6202.....	2	gloves	1	50...	3 00
452.....	4	½ hose.....		85.....	3 40
124					
1189	½	ladies' hose.....	4	50.....	2 25
7028.....	3	" "	4	50.....	13 50
2839.....	½	" "	12	00.....	6 00
05.....	10	" "		85.....	8 50
7.....	5	" "	1	00...	5 00
2.....	10	" "		70.....	7 00
322.....	2	" "	1	20.....	2 40
1203.....	2	" "	2	50..	5 00
5204	3	" "	3	00.	9 00
8307.....	4	" "	2	25.....	9 00
104.....	4½	misses' hose...	2	00...	9 00
160.....	4	" "	2	00.....	8 00
5016.....	2	" "	2	25.....	4 50
113.....	3	" "		61.....	1 95
301.....	2	" "		65.....	1 30
707.....	2	" "		75.....	1 50
710.....	3	" "		75...	2 25
126.....	11	" "	1	20.....	13 20
	½	dress shirts.....	12	00.....	6 00
D.....	½	" "	12	00.....	6 00
200.....	1	negligé shirts.....			4 50
509.....	1	" "			4 00
300.....	1	" "			2 75
13/12/—...	1	child's vests.....			4 50
189.....	½	ladies' vests.....	4	50...	2 25
187.....	½	" "	3	00.....	1 50
192.....	½	" "	5	50.....	2 75
106.....	3	" "	2	25.....	6 75
934.....	10	" "	2	00.....	20 00
389.....	10	" "		75.....	7 50
		Straps...			50
					393 52

125 *Credit Memorandum.*

Please note.

It will much oblige us and greatly facilitate the crediting of returns and claims if you will kindly note our instructions on billheads, viz., to give the date of bill; also No. and page of sales book in which the goods in question were originally charged, and why returned.

NEW YORK, *Nov.* 26, 1890.

Dunham, Buckley & Co., 340, 342, & 344 Broadway.

To J. R. Holloway & Co., Fort Worth, Texas:

Salesman, Dutcher.

Ret'd.
On invoice Nov. 1, Book E 13, folio 446.

2411.... 1 bl'k velvet, 23⅜, at 65..... 15 36

Duplicate.

Exhibit No. 35. S. A. Emanuel, notary, &c.

126 *Credit Memorandum.*

Please note.

It will much oblige us and greatly facilitate the crediting of returns and claims if you will kindly note our instructions on billheads, viz., to give the date of the bill; also No. and page of sales book in which the goods in question were originally charged, and why returned.

NEW YORK, *Nov.* 26, 1890.

Dunham, Buckley & Co., 340, 342, & 344 Broadway.

To J. R. Holloway & Co., Fort Worth, Texas:

Salesman, Dutcher.

Ret'd.
On invoice Oct. 31, Book F 58, folio 408.

961 .... 2 dz. l'd's vests & pants, at 2.00..... ..... 24 00

Duplicate.

Exhibit No. 36. S. A. Emanuel, notary, &c.

127 *Credit Memorandum.*

Please note.

It will much oblige us and greatly facilitate the crediting of returns and claims if you will kindly note our instructions on billheads, viz., to give the date of bill; also No. and page of sales book in which the goods in question were originally charged, and why returned.

NEW YORK, *Dec.* 27, 1890.

Dunham, Buckley & Co., 340, 342, & 344 Broadway.

To J. R. Holloway & Co., Fort Worth, Tex.:

Salesman, Dutcher.

Ret'd.
On invoice Dec. 10, Book F 69, folio 269.

143.....	1 dz. E. M. B. C. hdkfs.....	10 50
	$\frac{5}{6}$ " kid gloves, at 15.....	12 50
		23 00

Duplicate.

Exhibit No. 37. S. A. Emanuel, notary, &c.

128 *Credit Memorandum.*

Please note.

It will much oblige us and greatly facilitate in the crediting of returns and claims if you will kindly observe our instructions on bill-heads, viz., to give the date of bill; also No. and page of sales book in which the goods in question were originally charged, and why returned.

NEW YORK, *Feb.* 17, 1891.

Dunham, Buckley & Co., 340, 342, & 344 Broadway.

To J. R. Holloway & Co., Fort Worth Texas:

Salesman, Dutcher.

Ret'd on invoice. Book —, folio —.

$\frac{1}{3}$ doz. Mos. kid gloves at 30.00.....		10 00
$\frac{1}{12}$	at 24.00.....	2 00
		12 00

Duplicate.

Exhibit No. 38. S. A. Emanuel, notary, &c.

129 *Charge Memorandum.*

NEW YORK, *Nov.* 26, 1890.

M-. J. R. Holloway & Co., Fort Worth, Texas, to Dunham, Buckley & Co., 340, 342, & 344 Broadway.

Salesman, J. T. Dutcher.

To charge on goods returned.... ..... 1 65

Duplicate.

We beg to call your attention to the above charge memorandum, which explains itself. The omission or error was not discovered when invoice was rendered. Please add the amount to the original bill when paying the same.

130 STATE OF NEW YORK, }
New York County, } ss:

I, S. A. Emanuel, a notary public within and for said county, in said State, hereby certify that the above-named witnesses, to wit, James H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A Davis, before going the foregoing testimony, were and each of them — by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause and matter for which said depositions were taken, and, having been produced by the plaintiffs in said case, are examined by said plaintiffs, but were not examined by or on behalf of the defendant; that said depositions were written down by me.

That said depositions were and each of them was carefully read to the deponent giving such testimony before he subscribed to the same, and afterwards subscribed by said witnesses separately in my presence; that the defendant, J. R. Holloway, did not appear, and that the taking of said depositions commenced on Wednesday, the 30th day of December, A. D. 1891, and was finished on the same day, and before 6 o'clock p. m.

In witness whereof I have hereunto set my hand and affixed my seal this 30th day of December, A. D. 1891.

S. A. EMANUEL,
[SEAL.] *Notary Public N. Y. Co., No.* 10 *Wall St.,*
New York City, N. Y.

Notary's fees paid by pl'ffs, $40.

S. A. EMANUEL, *Notary, &c.*

131 (Endorsements on the back of said depositions as follows:)
"Oklahoma Territory. District court, third judicial district. James H. Dunham *et al. vs.* J. R. Holloway. Depositions. S. A. Emanuel, notary public, 10 Wall street, New York. Opened by order S. Armstrong and filed in district court, Oklahoma Co., Ok. Ter., Feb. 11, 1892. Will H. Clark, clerk, E. W. Sweeney, deputy."

(The envelope in which said depositions came is endorsed as follows, to wit:)
"333. 3–109. Territory of Oklahoma, Oklahoma county. In the district court of said Territory within and for said county. James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, plaintiffs, *vs.* J. R. Holloway, defendant. Depositions of James H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A. Davis, taken upon the part of the plaintiffs, to be used in said cause. Dated New York city, N. Y., December 30, 1891. S. A. Emanuel, notary public, N. Y. Co. From S. A. Emanuel, 10 Wall St., N. Y. city. Will H. Clark, Esq., clerk of the district court, Oklahoma city, Oklahoma Territory. Filed in the third district court Jan'y 9, 1892. Will H. Clark, clerk Oklahoma county, Ok. Ter."

132 OKLAHOMA TERRITORY, }
County of Oklahoma. }

In the District Court of said Territory within and for said County, in the 3rd Judicial District.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHAS. H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

The answer and depositions of A. B. Smith and James Riley, each (here the seal of the notary has cut out the words and it is left blank) resides in the county of Tarrant and State of Tex (words cut out same as above) hereinafter stated direct and cross-interrogatories (here words cut out same as above) ed to them in the above-entitled cause, taken before (here words cut out same as above) am D. Williams, a notary public within and for the said (here words cut out as above) of Tarrant and State of Texas.

Interrogatories Propounded to and Answers Made by the Witness, A. B. Smith.

Int. 1. You may state your name, age, place of residence, and occupation.

To which interrogatory the said witness makes answer as follows, to wit:

My name is A. B. Smith; I am 36 years of age; I reside in the city of Fort Worth, in Tarrant county, Texas; I am the cashier of the Merchants' National Bank of Fort Worth.

Int. 2. Do you know J. R. Holloway?

To which the said witness makes answer as follows, to wit:

I know J. R. Holloway.

133 Int. 3. Are you acquainted with his family, or do you know them or any of them? If so, state the extent of your acquaintance.

To which the said witness makes answer as follows, to wit:

I am acquainted with the family of Mr. J. R. Holloway, or at least of all the members of his family who lived in Fort Worth. Mr. Holloway and his family resided for twelve or eighteen months in a house belonging to and rented from me. This house was just across the street from my residence, in Fort Worth. I met the members of Mr. Holloway's family frequently.

Int. 4. Do you know when Mr. Holloway left Fort Worth? If so, you may state the time.

To which the said witness makes answer as follows, to wit:

I remember Mr. Holloway left Fort Worth, but I do not remember on what day of the week or of the month he left. It was about the last of September, 1891. Two of his sons went with him.

Int. 5. Where, if you know, did his family reside on or about October 31st, 1891?

To which the said witness makes answer as follows, to wit:

The wife and daughters of Mr. Holloway were living in Fort Worth at the date mentioned.

Int. 6. You may state how long his family had resided at that place previous to November 1st, 1891.

To which the said witness makes answer as follows, to wit:

About twelve or fifteen months.

Int. 7. Where, if you know, was his family residence on this date—that is, November 1st, 1891—and how long had they been at that place, and who constituted his family?

To which the said witness makes answer as follows, to wit:

On November 1st, 1891, Mr. Holloway had a wife, a sister, and two daughters, who were then living in Fort Worth, Texas. He and his two sons were not then in Fort Worth. Mr. Holloway's family consisted of Mr. Holloway himself, his wife, his two sons, his two daughters, and his sister.

134 Int. 8. State fully and particularly all that you know about the residence of Mr. Holloway, as to when he took up his residence at Forth Worth, in what part of the city he resided, and give the date as definitely as you can when his residence in Fort Worth was broken up and his family removed from that place.

To which the said witness makes answer as follows, to wit:

Mr. Holloway came to Fort Worth about twelve or eighteen months ago. He rented a house from me on Broadway, in what is locally known as South Fort Worth, just across the street from my residence. He and the other members of the family moved into this house and continued to reside there until they left Fort Worth. I have stated when Mr. Holloway and his two sons left. The remainder of his family left about the middle of December, 1891.

Cross-interrogatories to the said Witness and His Answers Thereto.

Cross-int. 1. State whether or not Mr. Holloway stated when he left Fort Worth, Texas, in September, 1891, that he intended to make Oklahoma city his home.

To which the said witness makes answer as follows, to wit:

He did so state, that he intended to make Oklahoma city his home.

STATE OF TEXAS, }
County of Tarrant. }

I, William D. Williams, a notary public in and for said State and county, do hereby certify that between the hours of ten o'clock a. m. and four o'clock p. m. of the 5th day of February, A. D. 1892, at my office, in the city of Fort Worth, in said county and State, before me personally appeared A. B. Smith, who resides in said city, county, and State, and who is to me personally well known, who, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause or matter at issue between the above-named plaintiffs, James H. Dunham,

135 William T. Buckley, Chas. H. Webb, and Wm. E. Webb, and the defendant, J. R. Holloway, in the certain suit pending in

the district court of the Territory of Oklahoma, within and for the county of Oklahoma, in the 3rd judicial district, was then examined by the said plaintiffs, and afterward by the said defendant, and that the questions propounded by the said parties to the said witness and the answers made by the said witness thereto were by me, the said William D. Williams, reduced to writing, as hereinbefore set forth, and were by the said witness, A. B. Smith, subscribed in my presence, and that the said defendant, J. R. Holloway, attending the examination of the said witness by attorney and participated therein.

In witness whereof I have hereunto affixed my official signature and seal this 5th day of February, A. D. 1892.

WILLIAM D. WILLIAMS,
Notary Public, Tarrant County, Texas.

Direct Interrogatories Propounded to and Answers Made by the Witness, James Riley.

Int. 1. You may state your name, age, place of residence, and occupation.

To which the said witness made answer as follows, to wit:

My name is Jim Riley; I am 19 years of age; I reside in Forth Worth, Texas, and am clerk in the Merchants' National Bank of Fort Worth.

Int. 2. Do you know Mr. J. R. Holloway?

To which the said witness makes answer as follows, to wit:

I do.

Int. 3. Are you acquainted with the family, or do you know them or any of them? If so, state the extent of your acquaintance.

To which the said witness makes answer as follows, to wit:

I am acquainted with the members of Mr. Holloway's family. I have known them ever since they moved into Mr. A. B. Smith's house in Fort Worth—that is, for from 12 to 18 months.

136 Int. 4. Do you know when Mr. Holloway left Fort Worth? If so, you may state the time.

To which the said witness makes answer as follows, to wit:

I think Mr. Holloway left Fort Worth about the middle of September, 1891. His two sons went with him.

Int. 5. Where, if you know, did his family reside on or about October 31st, 1891?

To which the said witness makes answer as follows, to wit:

On October 31st, 1891, Mr. Holloway's two daughters, his wife, and his sister resided in Fort Worth, Texas. Mr. Holloway and his two sons were not then living in Fort Worth.

Int. 6. You may state how long his family had resided at that place previous to November 1st, 1891?

To which the said witness makes answer as follows, to wit:

About 12 to 14 months.

Int. 7. Where, if you know, was his family residence on this date—that is, November 1st, 1891?—and how long had they been at that place, and who constituted his family?

To which the said witness answers as follows, to wit:

On November 1st, 1891, Mr. Holloway's wife, his two daughters, and his sister were living on the corner of Broadway and Jennings avenue, in Fort Worth, Texas, in a house owned by Mr. A. B. Smith. They had been living there some 12 or 14 months. Mr. Holloway and his two sons were then in Oklahoma Territory.

Int. 8. State fully and particularly all that you know about the residence of Mr. Holloway, as to when he took up his residence in Fort Worth, in what part of the city he resided, and give the date as definitely as you can when his residence in Fort Worth was broken up and his family removed from that place.

To which the said witness makes answer as follows, to wit:

Mr. Holloway and one of his daughters came to Forth Worth before the other members of his family. They took their meals at the boarding-house of Mrs. Groves, on West First street, but I do not know where they had rooms. Afterward, and about
137 the time Mr. Holloway rented the house of Mr. A. B. Smith, the remainder of his family came to Fort Worth. From this time until Mr. Holloway and his two sons left Fort Worth the entire family lived in Mr. Smith's house, on the corner of Broadway and Jennings avenue. First, Mr. Holloway and his two sons left, as I have stated; afterward, and just before Christmas, 1891, Mr. Holloway's wife, his two daughters, and his sister also left Fort Worth for Oklahoma.

JIM RILEY.

THE STATE OF TEXAS, }
County of Tarrant. }

I, William D. Williams, a notary public in and for said State and county, do hereby certify that between the hours of ten o'clock a. m. and four o'clock p. m. of the 5th day of February, A. D. 1892, at my office, in the city of Fort Worth, in said county and State, before me personally appeared James Riley, who resides in said city, county, and State, and who is to me well known, who, being by me first duly sworn to testify the truth, the whole truth, and nothing but the truth relating to the cause or matter at issue between the above-named plaintiffs, James H. Dunham, William T. Buckley, Chas. H. Webb, and Wm. E. Webb, and the defendant, J. R. Holloway, in the certain suit pending in the district court of the Territory of Oklahoma within and for the county of Oklahoma, in the 3rd judicial district, was then examined by the said plaintiffs and afterward by the said defendant, and that the questions propounded by the said parties to the said witness and the answers made by the said witness thereto were by me, the said William D. Williams, reduced to writing, as hereinbefore set forth, and were by the said witness, A. B. Smith, subscribed in my presence, and that the said defendant, J. R. Holloway, attended the examination of the said witness by attorney and participated therein.

In witness whereof I have hereunto affixed my official signature and seal this 5th day of February, A. D. 1892.

WM. D. WILLIAMS,

[SEAL.] *Notary Public, Tarrant County, Texas.*

138 Cross-int. 2. State whether or not he ever told you that he intended to return to Fort Worth?

To which said witness makes answer as follows, to wit:

He did not.

Cross-int. 3. In answer to direct interrogatory three (3) you state that you knew Mr. Holloway's family. State whether or not they ever told you that they intended to go to Oklahoma city.

To which the said witness makes answer as follows, to wit:

They repeatedly told me that they intended to go to Oklahoma city as soon as a house could be secured there for them to occupy. They told me they would vacate my house then, and for me to rent it. They did leave as soon as they had notice that a house had been secured for them.

A. B. SMITH.

Cross-interrogatories Propounded to the Witness, James Riley, and the Answers of the said Witness thereto.

Cross-int. 1. State whether or not Mr. Holloway and his two sons said anything to you about making their homes in Oklahoma city when they left Fort Worth, in September, 1891.

To which the said witness makes answer as follows, to wit:

They did. They said they were going to Oklahoma city and were going into business there, and that as soon as they could find a house or suitable accom-odations the remainder of the family would follow them.

JIM RILEY.

(Endorsements on the envelope in which said depositions came, as follows, to wit:)

"James H. Dunham *et al. vs.* J. R. Holloway. In dist. ct., Oklahoma county, & 3 judicial district. The depositions of A. B. Smith and James Riley, witnesses for plaintiffs. No. 333. To the clerk of the district court of Oklahoma Territory for the county of Oklahoma and 3rd judicial district, Oklahoma city, O. T. Wm. D. Williams, notary public, Tarrant county, Texas. Filed in
139 the third district court Feb. 9th, 1892. Will H. Clark, clerk, Oklahoma county, Ok. Ter."

(Here insert grounds of exception.)

(In the original bill of exceptions, filed June 30th, 1892, the following objections of counsel, the rulings of the court, and the exceptions thereto do not appear, but are here inserted from the long-hand report of the stenographer, filed in this court on June 22nd, 1892, and are as follows, to wit:)

DEFENSE: If the court please, we object and except to the introduction of any testimony in this case until the question of the disposition of the motion to discharge the attachment has been disposed of; object to the introduction of any testimony as to the amount of indebtedness until the motion has been disposed of as to the attachment.

Objection overruled and excepted to by the defendant.

PLAINTIFF-: If the court please, I will read the deposition of James H. Dunham.

DEFENDANT: If the court please, I now object on the ground that the certificate of the notary taking it (the deposition) is insufficient.

Objection overruled and excepted to by the defendant.

Here attorney for the plaintiff- read the deposition of James H. Dunham to the jury.

Here attorney for the plaintiff- commenced the reading of the deposition of John T. Dutcher to the jury. After the reading of the following interrogatory the defendant objects: "Please examine exhibits attached to deposition of James H. Dunham and designate the goods that were purchased by J. R. Holloway personally and which were ordered in writing;" and the defendant asks that Exhibits "A" and Exhibits One to Thirty-four, inclusive, attached to the deposition- of James H. Dunham, Dutcher, Walker, and Davis be not admitted in evidence for the reason that the same are simply copies of the books of original entry and are incompetent testimony; and the defendant also objects to the reception of the testimony of Mr. Dunham, Mr. Dutcher, and the other witnesses relating to and based upon these exhibits; objection based on the same reasons as before.

140 DEFENDANT: No, sir; it is about the admission of these exhibits.

COURT: I think the testimony is perfectly admissible.

To which ruling of the court the defendant excepts.

Here the attorney for the plaintiff- offers to read and read the deposition of Henry H. Walker to the jury; to which the defendant objected and excepted for the same reason as above. The defendant also objected to the admission of the copies of bills as sworn to by Mr. Dunham. Overruled and excepted to by the defendant.

DEFENDANT: At the conclusion of the reading of the testimony of the witnesses in the general deposition, counsel for the defendant again interposes an objection to the admissability of the exhibits thereto attached on the ground of their being incompetent, they being simply copies of the books of original entries.

Objection overruled by the court and by the defendant excepted to.

Here counsel for the plaintiff- offers to read to the jury the deposition of J. H. Bradley. Counsel for the defendant objects to the admission of the deposition, as evidence, of J. H. Bradley for the reason that the certificate of the notary is not in accordance with the law in such cases made and provided, and the further reason that the depositions *are* not taken pursuant to notice, as prescribed by law, and that it was taken under one provision of the law and the notice given under another. Objection overruled and excepted to by the defendant. Deposition read.

Here court adjourned until 2 o'clock p. m.

Met pursuant to adjournment.

Here attorney for the plaintiff- read the direct examination of the

testimony in the deposition of A. B. Smith to the jury, and then asked that the jury be withdrawn. Jury withdrawn.

PLAINTIFF-: One of the allegations in this affidavit for attachment is that this defendant was at that time a non-resident. In order to prove his residence and fix his domicil, we took the evidence of this witness which your honor perhaps heard me read to the jury.

141 The only things testified to by this witness are that on the first day of November the family of Mr. Holloway resided in Fort Worth, residing in the same residence in which he and his family had previously resided for 12 to 18 months. It is further testified some time in the month of September Mr. Holloway and his 2 sons left there. Nowhere in this examination-in-chief is the declaration of Mr. Holloway referred to or called out. The cross-examination is not directed to a single matter that was elicited in chief. The first interrogatory is:

"State whether or not Mr. Holloway stated when he left Fort Worth, Texas, in September, 1891, that he intended to make Oklahoma city his *gome*." Interrogatory second: "State whether or not he ever told you that he intended to return to Fort Worth." (Answer.) "He did not." Interrogatory three: "In answer to direct interrogatory three you state that you knew Mr. Holloway's family. State whether or not they ever told you that they intended to go to Oklahoma city."

The first objections is this matter is not in any way cross-examination; it enters entirely upon a new field; it makes that witness strictly and alone the witness of the party who is cross-examining him. The objection which underlies and is at the basis would perhaps be better argued later on, because we contend his domicil fixes his residence. It is here sufficient to make the objection that it is not cross-examination, and another objection that they are not allowed to ask what this man's views are on that particular subject, but the particular language used. (Argument on objection.)

COURT: A man's domicil is proven by his declarations, connected with his acts.

COUNCIL FOR PLAINTIFF-: I submit, then, that then this would be utterly incompetent, because the questions are leading.

COURT: The second question, when they come to introduce their defense, I shall permit to be read and drawn out as their own witness. The question that he did not speak of the subject of his intending to return, I cannot see its force one way or the other;

142 it is entirely negative. In the last question the largest portion is merely heresay, but the fact that they did leave—he, Smith—is admitted to be read to the jury over the objection of the plaintiff-, and all other question- ruled out; to which the defendant objects and excepts. The entire cross-examination of witness Riley ruled out; to which the defendant objects and excepts.

COUNSEL FOR THE DEFENDANT: If your honor please, I understand these exhibits to have been admitted this morning.

COURT: Oh, yes, sir. I admit them: to which the defendant excepts.

Jury brought into court.
Deposition of James Riley read to the jury.
Plaintiff- rests.

And the plaintiff- rested.

And the defendant, to sustain the issues on his part, introduced the following evidence:

Defendant offerred and read in evidence cross-interrogatory one and the answer thereto of deponent A. B. Smith, the other cross-interrogatories and answers thereto having been excluded by the court. (Here insert all cross-interrogatories and answers thereto.)

(The following cross-interrogatories were not contained in the original bill of exceptions, filed on June 30th, 1892, but are here inserted and are as follows, to wit:)

Testified to in the latter part. This is all I can see is admissable.

COUNSEL FOR PLAINTIFFS: There is another deposition continuing on this same subject.

COUNSEL FOR THE DEFENDANT: The depositions were taken for the purpose of proving the defendant a non-resident. The witnesses are put on to ascertain the facts.

COURT: I understand your proposition is this: that in cross-examination you can go outside of the direct examination and ask anything touching the subject in issue?

143 DEFENDANT: Not in issue between the parties, but in issue in the deposition.

COURT: I understand the rule of cross-examination is this: you have got to confine the witness to the matter that you have interrogated upon. You must confine yourself to the direct examination of that witness; if you want to use him as your own, put him on the stand as your own, however it may call out other facts to sustain or rebut the facts you wish to prove, and if you wish to call him, call him yourself.

DEFENDANT: I have always understood that an objection to a question propounded on cross-examination as not proper cross-examination should be made at the time of the taking of the deposition.

COURT: I understand that the statutes states that you can take them there and also take them here.

To all of which ruling the defendant excepts.

The first cross-interrogatory of the testimony of A. B. Smith.

Cross-interrogatories to the said Witness and His Answers Thereto.

Cross-int. 1. State whether or not Mr. Holloway stated when he left Fort Worth, Texas, in September, 1891, that he intended to make Oklahoma city his home.

To which the said witness makes answer as follows, to wit:

He did so state that he intended to make Oklahoma city his home.

Cross-int. 2. State whether or not he ever told you that he intended to return to Fort Worth.

To which said witness makes answer as follows, to wit:

He did not.

Cross-int. 3. In answer to direct interrogatory three (3) you state that you knew Mr. Holloway's family. State whether or not they ever told you that they intended to go to Oklahoma city.

To which the said witness makes answer as follows, to wit:

They repeatedly told me that they intended to go to Oklahoma city as soon as a house could be secured there for them to occupy. They told me they would vacate my house then, and for me to rent it. They did leave as soon as they had notice that a house had been secured for them.

A. B. SMITH.

144 *Cross-interrogatories Propounded to the Witness James Riley and the Answers of the said Witness Thereto.*

Cross-int. 1. State whether or not Mr. Holloway and his two sons said anything to you about making their homes in Oklahoma city when they left Fort Worth in September, 1891.

To which the said witness makes answer as follows, to wit: They did. They said they were going to Oklahoma city and were going into business there, and that as soon as they could find a house or suitable accom-odations the remainder of the family would follow them.

JIM RILEY.

The defendant, J. R. Holloway, testified in his own behalf as follows: (Here inse-t.)

(The following testimony was not contained in the original bill of exceptions, filed June 30th, 1892, but is here inserted and is as follows, to wit:)

J. R. Holloway, for the defendant, being first duly sworn, testified as follows:

Q. Where do you reside, Mr. Holloway?
A. I live in Oklahoma city.
Q. You may state, if you please, whereabouts in Oklahoma city.
A. 205 Fifth street.
Q. How long have you lived there?
A. There now.
Q. In Oklahoma city?
A. I've lived here since the 14th of September.
Q. 1891?
A. 1891.
Q. Of what is your family composed?
A. Myself and wife, 2 sons and 2 daughters, and my sister. I have *I have* a sister that stays with us at present.
Q. Where did you live before you came to Oklahoma city?
A. Fort Worth, Texas.

145 Q. When did you personally leave Fort Worth, Texas—after the 14th?

A. I left there on the 13th day of September.
Q. 1891?
A. 1891.
Q. What was your business at Fort Worth?
A. I was in the dry-goods business.
Q. What did you come to Oklahoma city for, in September, 1891, from Fort Worth, Texas?
A. I came here to do business.
Q. I'll ask you whether you came in advance of your goods?
A. Yes, sir.
Q. Make inquiry for a location?
A. No, sir; I had already made that. I came here to have the house shelved.
Q. You had made your inquiries by correspondence?
A. I had been here before and had made arrangements.
Q. How long before you had been here?
A. Well, it was the latter part of August.
Q. About what time did you get here with your goods?
A. The goods got here on the 20th of September—somewhere along there.
Q. When did your sons come, in relation to the time that your goods came?
A. They came within a few days after I did. They stayed there finishing, boxing up, and shipping.
Q. They stayed back at Fort Worth?
A. Yes, sir.
Q. Where were your goods put when they came?
A. In the building where they now are.
Q. Where is that building?
A. On Broadway, in the Court-house block.

(Witness here handed Exhibit B.)

146 Q. State whether or not that was received by you by mail in response to a letter from you addressed to the plaintiffs in this action.
A. Yes, sir—that is, I received it after I come here.
Q. In the usual course of mail, out of the post-office?
A. Yes, sir; through the mail.

(Exhibit B offered in evidence; to which the plaintiff objects as being incompetent and irrelevant. Overruled and excepted to.)

Q. If I understand you correctly, you got here the 14th day of September, 1891?
A. 14th.
Q. And the goods and your sons came between that time and the 20th of September?
A. Yes, sir.
Q. The goods were at once unpacked and put on sale in the store-room occupied by you?
A. It was a few days afterwards. We did not have our shelving ready. We piled them up then; had to wait.

Q. How long after was it that your wife and daughters came?
A. Well, they didn't come—I think along about the middle of December.
Q. Why not?
A. Because we could not get a house.
Q. Did you try to get one?

(PLAINTIFF-: This is all understood as objected to, your honor? COURT: Yes, sir.)

Q. Did you try to get one?
A. Yes, sir.
Q. When did you commence trying to get a house?
A. Well, we commenced right away. I went once to see Mrs. White with reference to her house. I was told it was to rent. I was there once or twice to let it. It was rented, and then afterwards I saw her again—a month afterwards—and agreed on the price of the house and agreed to take it——

147 Q. I will ask you whether or not it was *of* your intention at the time you moved up here that your family should come, and this should be your home and you should reside here.

(Objected as incompetent, immaterial, and irrelevant—improper manner in which to show the fact. Objection withdrawn.)

A. It was.
Q. Your family afterwards came about the 20th of December, I understood?
A. Between the 12th and the 20th.
Q. Since that time to the present time you and they have made this your home, have you not?
A. Yes, sir.
Q. Living here now?
A. Living here now.
Q. When did you leave Texas to come—you personally?
A. I left there the 13th of September.
Q. 13th of September?
A. Yes, sir; '91.
Q. And you came then to Oklahoma city?
A. Yes, sir; got here the morning of the 14th.
Q. And been here ever since?
A. And been here ever since.
Q. Are you acquainted with one J. H. Bradley, claimed to be a traveling salesman or something for the plaintiffs in this cause?
A. Yes, sir.
Q. Mr. Bradley in his deposition stated that you said to him in a conversation that you had with him in October, 1891, that you were bound to reduce your stock in some way, even if you had to do it by force- sales, and called his attention to the advertis-ment you had in a newspaper; is that substantially correct?
A. Some of it is; we had some talk with reference to reducing the stock, &c.

Q. He further testified that he asked you if you made the change with the intention of making Oklahoma city your permanent
148 home, and that you stated that you did not; is that correct?
A. No, sir.

Q. Did you also tell him at that time that it was your intention to dispose of all or as much of your stock as you could, and then return to Fort Worth?

A. No, sir.

Q. Did you tell him that you thought you'd go in the millinery business at Fort Worth?

A. Never told him any such stuff.

Q. Did he then state to you, in substance, this move is an experiment and you regard Fort Worth as your home; to which you said, "Yes, sir"?

A. No, sir.

Q. You did tell him that you'd give lands in payment of the debt, but you would not incumber them by a mortgage, did you?

A. Yes, sir; I'd make a deed straight to them.

Q. Did you tell him where your family was at that time?

A. I don't recollect whether I did *not* not.

Q. Did you say anything to him about them coming here?

A. I don't think there was anything said about their coming.

Q. I will ask you whether or not you ever made any sales of your property with intent to cheat, defraud your creditors?

A. I did not.

Q. What sales you made were in the legitimate course of trade, were they not?

A. Yes, sir.

Q. I would ask whether or not the goods were taken away from you by the sheriff on the attachment writ?

A. Yes, sir.

Q. When?

A. 31st of October.

Q. Tied it up for several days until you could give a redelivery bond?

A. Yes, sir.

Q. It was not beneficial to your trade, was it?
149 A. Not very.

Q. Mr. Bradley in his deposition also testifies that these different tracts of lands which you offerred to make a deed were all incumbered; that was a fact, was it?

A. Yes, sir.

Q. I will ask you whether you didn't offer to clear the incumbrances of one 160?

(Obj. as incompetent.)

A. It — 320; that is, I told him I would pay off the incumbrance and give a deed to him free of incumbrance.

COURT: Off of the 320?

A. Yes, sir.

Q. That he states was incumbered for $800; is that correct?
A. Yes, sir; that is correct.

The defendant offerred to read in evidence Exhibit "B" as follows:

Dunham, Buckley & Co., dry goods, 340, 342, & 344 Broadway.
P. O. box 147.

NEW YORK, *Sept. 25th*, 1891.

Mr. J. R. Holloway, Oklahoma, I. T.

DEAR SIR: Your favor notifying us of your removal to Oklahoma, I. T., is at hand. We have no doubt but that it is a good move, and trust you will be able to realize on sales at once and send us some money.

Yours truly, DUNHAM, BUCKLEY & CO.

The defendant Holloway testified *in* cross-examination as follows: (Here insert.)

Cross-ex.:

Q. You know Mr. Bradley, Mr. Holloway, do you?
A. Yes, sir.
150 Q. Know him very well, don't you? You know that the old gentleman is not here now, don't you, Mr. Holloway?
A. I don't know; I hav'n't seen him.
Q. Don't you know that he is not here?
A. I have not seen him.
Q. You have reason to belie*be* that he is not here?
A. I don't know; I have not seen him here; he might be here, for all I know.
A. He did have during those days that he was here a number of conversations with you in relation to that account and settlement of it?
A. I think two or three days, probably.
Q. And at different times you had a number of conversations. Now, you said, in answer to your counsel, that you offered to clear up the incumbrance of $800 *or* 320. Where is that land?
A. Woodson county, Kansas.
Q. What part of the State is that in?
A. Well, it is the middle part of the State—well, it is rather eastern part.

(Here attorney for the plaintiff- hands witness paper purporting to be answer in the case.)

Q. Is that your signature?
A. That is my son's, I think.
Q. Is that not your own signature, Mr. Holloway?
A. No, sir.
Q. Did you take that oath?
A. No, sir; it is not my signature.

Q. Then that is not your oath to which Mr. Armstrong, as notary, has subscribed.

Obj. as improper cross-ex.

(ATTORNEY FOR PLAINTIFF-: We — not offer a motion for judgment for plaintiff- upon complaint herein, for reason that there is no answer in the record. There is a sworn declaration that this debt is due, purporting to be sworn to by J. R. Holloway, the defendant, to which is attached the signature and jurat of Mr. Armstrong here, the notary.)

151 COURT (to Armstrong): How long had you been in this case when you administered this oath to this man?

A. I don't know, sir.

Q. Suit had been commenced a month or two?

A. I don't know, sir; I don't think it had. I was not acquainted with the Holloways until some time after we was in this suit. Mr. Holloway done all of his business with Mr. Williams and Turner. I was called on to administer that affidavit and I did that. I didn't write it and I didn't have anything to do with it. I swore that party to that affidavit, and I didn't know who he was or anything about it.

(Further inquiry as to the affidavit.)

Mrs. WHITE, being called for — on behalf of defendant, testified as follows: (Here insert.)

(The following testimony was not contained in the original bill of exceptions, filed June 30th, 1892, but is here inserted and is as follows, to wit:)

Mrs. S. T. E. WHITE, for the defendant, being first duly sworn, testified as follows:

Q. State your name and place of residence.

A. Mrs. White. I live on Third street.

Q. Are you acquainted with Mr. Holloway, the defendant in this case?

A. Yes, sir.

Q. How long have you been acquainted with him?

A. Since last September 14—13 or 14.

Q. State what, if any, conversation he made about renting a house from you, and for what purpose.

(Obj. as incompetent, immaterial, and irrelevant.)

COURT: The fact of his renting a house you can prove.

Q. State whether or not he applied to you to rent a house.

A. Yes, sir. Mr. Holloway called on me about the 14th to apply for the renting of a house on the hill, the large house there.

And A. O. KINCAID, being called for — on behalf of defendant, testified as follows: (Here insert.)

152 (The following testimony is not contained in the original bill of exceptions, filed June 30th, 1892, but is here inserted and is as follows, to wit:)

A. O. KINCAID, for the defendant, being first duly sworn, testified as follows:

Q. Mr. Kincaid, where do you reside?
A. Oklahoma county.
Q. Are you acquainted with J. R. Holloway, the defendant?
A. Yes, sir.
Q. When did you first get acquainted with him?
A. I think it was about the last of July, '91—first of August, along about that time some time—he first came up to Oklahoma, the first I ever saw of him.
Q. What business was you in at that time?
A. I was clerking at the International hotel. Mr. Holloway stopped there.
Q. What was Mr. Holloway's business here on that trip?

(Obj. as incompetent, immaterial, and irrelevant. Sust.)

A. The best I can remember, it was probably the first of August that he first came up——
Q. What, if anything, did you do towards trying to get a house for Mr. Holloway?

(Obj. as incompetent, immaterial, and irrelevant.)

A. Well, when he first came up he was after a business house?
Q. Was he here twice?
A. Yes, sir.
Q. Which time do you refer to?
A. First time.
Q. At the first time what did you attempt to do for him?
A. Well, he was looking for a location, his mind was agreed about on this place or Denison, Texas, and I rather took an interest in him and done all I could.

Q. You attempted to get a business house for him?
153 A. I did, and finally secured the house he is now in.
Q. How long until he was up again?
A. The first of September or latter part of August.
Q. Then you attempted to get a residence for him, did you not?
A. After he had secured that matter—that business house—he sent me the first payment that was sent up here from Fort Worth, Texas, a half month's rent in advance. I got a receipt of Mr. Bassett'- agent, Mr. Darrough; Mr. Bassett was absent at the time. He then written to me to try to get a residence for him, stating to me that he had a good-size family——
Q. You attempted to get a residence for him?
A. Yes, sir.
Q. I will ask you whether or not residences were very scarce at that time?
A. Very.
Q. Did you try to get a residence for him?
A. I tried to get one.
Q. Introduced him to Mrs. White, did you not, subsequently?
A. No; he went there alone. I didn't know anything about that

time about Mrs. White's, but I visited one or 2 other places, and the house that he now occupies is one of them; and then Mr. McClure, agent for Mr. Gault, who owned the building—that is his house—I attempted to get that brick house or Mr. Gault's house——

Q. You could not get it at that time?

A. I could not get any satisfaction; he said if he didn't move into it himself he could get it. Then I visited Mr. Ragon, who owns the house on the corner of Fifth and Harvey—a big, large house. He had two tenants and said if he could get rid of these——

Q. What time was that you were making these efforts for a house, what time of year, do you remember?

A. Why, it was in September.

Q. After Mr. Holloway and his boys come up here, was it not?

154 (Obj. as leading.)

A. It was before and after, both, that I looked for a house, several days; I don't remember how long after the boys got here before I could get any satisfactory answer about the house.

Q. I will ask you whether or not you didn't spend several days trying to get a house for them?

A. Yes, sir; I was looking for a house for several weeks.

Q. I will ask you whether or not you succeeded in getting a house in which he could get instant or immediate possession?

A. I did.

Q. Finally got the house he occupied?

A. He and I together got it.

Q. That was about the beginning of the winter?

A. Well, I don't remember exactly; I think it was in October, but then I could not positively state.

Q. They didn't get immediate—that is, possession was not given immediately?

A. No; they had been here some time.

(On the back of the above testimony is the following endorsements:)

"I *d*i hereby certify that the within and foregoing is a copy of my notes of the testimony, objections, and exceptions taken on the trial of the within-entitled case. Chas. E. Gleckler. Stenographer's fee, $2.00; transcript, 45 fol., 2.70—4.70. P'd by defendant, Chas. E. Gleckler. #333. Dunham *vs.* Holloway. Testimony. Filed
155 in district court, Oklahoma Co., Ok. Ter., Jun- 22, 1892. Will H. Clark, clerk, by Adah Curnutt, d'p'ty."

And this was all the evidence given in the cause.

And the defendant now tenders this his bill of exceptions and prays that the same may be signed, sealed, and made a part of the record, which is done this 25th day of June, 1892.

December 27th, 1892.

JOHN G. CLARK, *Judge.*

(Endorsements on the back of said bill of exceptions as follows, to wit:)

"No. 333. J. H. Dunham *et al. vs.* J. R. Holloway. Bill of exceptions. Presented to the judge June 30th, 1892. Filed June 30th, 1892. Will H. Clark, clerk, by Adah Curnutt, d'p'ty."

156 That thereafter, on the 26th day of January, 1893, the following præcipe was filed, to wit:

In the District Court of the Third Judicial District within and for Oklahoma County, Oklahoma Territory.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Præcipe.

To the clerk of the above court:

You will make out a complete transcript of the record in the above-entitled case, containing the complaint filed on Oct. 31st, 1891; the affidavit for attachment and undertaking in attachment, filed on the 31st day of Oct. 1891; answer—general denial—filed Nov. 7, 1891; notice of motion to discharge attachment, filed Nov. 12, 1891; general denial, filed Nov. 23, 1891; defendant's answer in attachment, filed Nov. *we*, 1891; bond for costs, filed Nov. 23, 1891; affidavit for security for costs; answer of defendant, filed Nov. 25, 1891; answer, filed Nov. 28, 1891; motion to strike answer, filed Nov. 25, 1891; journal entry, filed June 13, 1892; journal entry, filed June 13, 1892; verdict, filed June 16, 1892; judgment, filed June 16, 1892; notice to clerk of appeal, filed June 16, 1892; notice to plaintiff of appeal, filed June 16, 1892; order of court, filed June 17, 1892; bond on appeal, filed June 28, 1892; make full and complete copy of bill of exceptions, filed June 30, 1892, and where in said bill of exceptions the words "here insert" are used, insert the testimony, deposition, or interrogatories, or whatever is referred to, in full; make copies of the orders of the court in reference to all motions mentioned in this præcipe as said orders appear of record in your office.

Dated this 26th day of January, A. D. 1893.

AMOS GREEN & SON,
Attorneys for J. R. Holloway.

157 (Endorsements on the back of said præcipe as follows, to wit:)

"333. James H. Dunham *et al. vs.* J. R. Holloway. Præcipe. Filed in district court, Oklahoma Co., Ok. Ter., Jan. 26, 1893. Will H. Clark, clerk, by Adah Curnutt, d'p'ty.

158 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

I, Will H. Clark, clerk of the district court of the third judicial district within and for said county and Territory, do hereby certify that the above and foregoing transcripts contains just, true, and

correct copies of the following, to wit: Complaint, affidavit in attachment; undertaking in attachment; answer, filed Nov. 28, 1891; bond for costs; judgment; answer, filed Nov. 7, 1891; *answer filed Nov. 7, 1891*; general denial, filed Nov. 23, 1891; notice of motion to discharge attachment; defendant's answer in attachment proceedings; affidavit for security for costs; answer, filed Nov. 25, 1891; motion, filed Nov. 25, 1891; journal entry; notice to clerk of appeal; verdict; journal entry, filed June 13, 1892; notice to plaintiff of appeal; order of court, filed June 17, 1892; appeal bond; original bill of exceptions, as the same appear of record and on file in my office; that where in said bill of exceptions the words "here insert" are used I have inserted the deposition, interrogatory, testimony or whatever was called for, and where such insertion is made the same are just, true, and correct copies of the same as they appear now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Oklahoma city, O. T., this 23rd day of February, A. D. 1893.

[SEAL.]

WILL H. CLARK,
Clerk District Court.

159 TERRITORY OF OKLAHOMA, } ss.
Oklahoma County. }

In the Supreme Court of the Aforesaid Territory.

JAMES H. DUNHAM *et al.*, Plaintiff, }
against } Assignment of Errors.
J. R. HOLLOWAY, Defendant. }

The defendant, by his attorneys, comes and says that on the trial of the aforesaid case in the court below many and manifest errors intervened in the rulings, instructions, and judgment of the court to the great prejudice of the rights of the appellant, and among the many errors so committed he assigns the following:

First. The court erred in ordering and directing the issues made on the attachment to be tried by a jury instead of by the court.

Second. The court erred in requiring the trial as to the validity of the attachment sued out in the case to be tried jointly with the merits of the case on the complaint and answer and by a jury.

Third. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

Fourth. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Dunham, J. T. Dutcher, Wm. Walker, and Edwin A. Davis.

Fifth. The court erred in allowing the exhibit attached to the depositions of James H. Dunham, J. T. Dutcher, W. H.
160 Walker, and Edwin A. Davis to be read in evidence.

Sixth. The court erred in refusing to allow the cross-interrogatories 2, 3, and 4 of the deposition of A. B. Smith to be read in evidence.

Seventh. The court erred in refusing to allow cross-interrogatory one of the deposition of James Riley to be read in evidence.

Eight. The court erred in refusing to allow the witnesses A. O. Kincaid and Mrs. White to testify as to what defendant said to them in his efforts to procure a house for his family and their replies thereto.

Ninth. The court erred in refusing each and all the instructions asked for by the defendant.

Tenth. The court erred in refusing instructions 3 and 4 asked for by defendant.

Eleventh. The court erred in giving each and all the instructions numbered 6, 8, 9, 10, and 11 to the jury over the objections of the defendant.

Twelfth. The court erred in giving and entering judgment for the amount it did, which is unauthorized by the evidence in the case and in excess of any amount shown by the evidence to be due.

Thirteenth. The verdict of the jury on sustaining the attachment and the judgment of the court thereon is contrary to the law and evidence of the case.

Fourteenth. The verdict and findings of the jury and the judgment of the court thereon are contrary to the evidence and law of the case.

Fifteenth. The special findings of the jury numbered one and two are unwarranted and unsustained by the evidence and contrary to law.

Sixteenth. The instructions given to the jury by the court as a whole are misleading and do not correctly state the law applicable to the evidence and issues in the case.

161 Seventeenth. The court erred in overruling defendant's motion for a new trial and rendering judgment upon the illegal findings and verdict of the jury.

Eighteenth. The court erred in permitting accounts to be proved and allowed against J. R. Holloway & Co., while the suit is against J. R. Holloway individually.

Nineteenth. The complaint and exhibits thereto attached and the evidence in the case show that the contract and purchase of the goods, wares, and merchandise was in the State of New York and governed by the laws of the State of New York, under which laws only six per cent. interest can be allowed and collected, and the court erred in allowing interest on said account at the rate of seven per cent. per annum.

Twentieth. The court erred in rendering judgment for more than the amount claimed in the complaint and interest thereon and more than the evidence and accounts filed as exhibits show to be due.

Twenty-first. Said judgment is not sustained by the proof, nor authorized by the complaint nor evidence in the case and is erroneous.

Twenty-second. The court erred in allowing any interest on said account, as no demand of payment was shown, and until such demand no interest under the laws of New York accrued.

Wherefore, for the many and manifest errors aforesaid, the de-

fendant says said verdict of the jury and judgment of the court rendered thereon should be set aside and a new trial granted the defendant.

LELAND AND AMOS GREEN & SON,
Attorneys for Appellant.

[Endorsed:] Filed Feb'y 25, 1893. Chas. H. Filson, clerk supreme court.

162 In the District Court in and for the County of Oklahoma and Territory of Oklahoma.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Bill of Exceptions.

Be it remembered that on the 14th day of November, 1891, it being a judicial day of the October term, 1891, of said court, the following pleas and proceedings were had in said cause before the Hon. John G. Clark, judge of said court:

The defendant moved the court to discharge the attachment heretofore issued in said cause and levied upon the property of the defendant on the following grounds: Because the affidavit for order of attachment was insufficient in law; because the facts stated in the affidavit were insufficient in law; because the facts stated in said affidavit were not true; which motion, with affidavits in support thereof, was submitted to the court and not heard, the court then ruling that the questions raised by the motion should properly be submitted to the jury and should be determined on the final hearing of the case; to which defendant at the time excepted.

2nd. That afterwards, to wit, on the 11th day of June, 1892, it being a judicial day of the April term of said court, the defendant filed his motion to suppress the deposition of J. H. Bradley, taken in behalf of the plaintiff-; which motion was as follows:

In the District Court of Oklahoma Territory within and for Oklahoma —, in the 3rd Judicial District.

JAMES H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.
} Motion to Suppress Deposition.

163 Comes now the defendant, J. R. Holloway, by his attorneys, Williams, Armstrong & Turner, and moves the court to suppress the deposition of J. H. Bradley, a witness for plaintiff-, taken before S. A. Emanuel, a notary public, in New York city, New York county and New York State, between the hour- of 9 o'clock in the morning and 5 o'clock in the evening of January 26th, 1892, for the following cause-, to wit:

1st. The deposition was not taken in compliance with any provision of the Oklahoma statutes.

2nd. The deposition was taken in violation of sections 4456, 4465, and 4486 of the Oklahoma statutes.

3rd. The informality in the taking of said deposition is prejudicial to the substantial rights of the defendant.

4th. The officer's certificate annexed to the deposition does not show that the deposition was read over to the witness before he signed the same.

5th. The officer's certificate annexed to the deposition does not show that the deposition was written by a disinterested person.

6th. It appears from the record that written interrogatories were placed in the hands of the officer who took the deposition, and that neither the defendant nor his attorneys were notified of this fact. The officer then, instead of acting the part of notary for both parties, acted as attorney for the plaintiff-.

7th. The officer has no right to propound interrogatories, except as given in section 4465, and then only after the witness is examined by the party producing him; also after examination by the adverse party.

8th. The answer to interrogatory 5 of the deposition is not responsive.

9th. The 5th interrogatory and all others were written by plaintiffs' attorneys and secretly transmitted to the notary who took the deposition, in violation of section 4486 of the Oklahoma statutes.

WILLIAMS, ARMSTRONG & TURNER,
Attorneys for Defendant.

And said motion was on the 13th day of June, 1892, a judicial day of said term, submitted to the court and overruled; to which the defendant at the time excepted.

3rd. That on the 11th day of June, 1892, it being a judicial day of April term of said court, the defendant filed his motion to suppress the depositions of J. H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A. Davis, taken in behalf of the plaintiff-; which motion was as follows:

164 In the District Court of Oklahoma County, of the 3rd Judicial District.

JAMES H. DUNHAM *et al.* *vs.* J. R. HOLLOWAY. } Motion to Suppress Depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis.

Comes now the defendant and moves the court to suppress the depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis, taken before one S. A. Emanuel, of New York, on the 3rd day of December, 1891, for the following reasons:

1st. The certificate of the notary does not show the place where the said depositions were taken.

2nd. It is not shown that the said S. A. Emanuel was a notary public at the time of the taking of said deposition-.

3rd. The certificate nor any part of the record bears the date and expiration of the notary's term of office.

S. ARMSTRONG,
Attorney for Defendant.

And said motion was on the 13th day of June, 1892, a judicial day of said April term of court, submitted to the court and overruled; to which the defendant at the time excepted.

4th. That previous to the commencement of the trial of the cause the defendant objected to the introduction of any evidence to the jury until the motion to discharge the attachment had been disposed of. Objection overruled by the court and excepted to at the time by the defendant.

5th. That in the trial defendant objected to the reading of the deposition of James H. Dunham, for the reason that the certificate of the notary taking said deposition was insufficient; which objection was by the court overruled and excepted to by the defendant at the time.

6th. That in the trial the defendant objected to the exhibits attached to the depositions of Dunham, Dutcher, Walker, and Davis being read in evidence or any statements of said witnesses based upon them, for the reason that, as shown by the depositions of said witness Dunham, said exhibits were but copies of books of original entries, and were therefore incompetent and heresay and secondary evidence; which objection was by the court overruled and excepted to at the time by the defendant.

165 7th. That on the trial plaintiff objected to the cross-interrogatories of A. B. Smith in his deposition and witness'*es* answers thereto being read to the jury; which objection was by the court sustained, excepting as to cross-interrogatory one and answer thereto; to which ruling of the court defendant at the time excepted.

8th. That on the trial of this cause the court gave to the jury the following instructions on its own motion:

In the District Court, Third District, Oklahoma County, Oklahoma Territory.

J. H. DUNHAM & Co., Plaintiff,
vs.
J. R. HOLLOWAY, Defendant. } In Attachment.

Gentlemen of the jury, I instruct you as follows:

1st. This action was commenced for the purpose of recovering the purchase price of certain goods alleged by the plaintiff Dunham to have been sold to the defendant, J. R. Holloway.

2nd. To secure the collection of said debt, should the plaintiff recover judgment, the goods of said defendant were attached upon two grounds:

1st. That the said defendant was not a resident of this Territory.

2nd. That he was fraudulently disposing of his property with the intent to cheat, hinder, or delay his creditors.

3rd. You are trying two issues:

1st. Whether or not the attachment herein shall be sustained.

2nd. Whether or not at the time of the commencement of this suit and at the present time the defendant was and is indebted to plaintiffs; and, if so, in what sum? and upon these two issues you will make separate verdicts.

3rd. The burden of the proof of both of these propositions is upon the plaintiffs, and before you can find in their favor they must prove the same by a preponderance of the evidence.

4th. If you shall find from the evidence that the defendant at the time of the issuing of the writ of the attachment herein was a non-resident of the Territory of Oklahoma, you will find the issue for the plaintiffs on this attachment; or if you find from the evidence that the defendant was disposing of his property subject to execution with the fraudulent intent to cheat, hinder, or delay his creditors at the time of the issuing of the writ of attachment herein, you will find the issue for the plaintiffs on the attachment.

5th. Fraud is not to be presumed without proof; yet, like any other fact, it may be proved by proving other facts and circumstances from which fraud may be inferred. Direct and positive proof is not required, nor must it be proved beyond a reasonable doubt, as in criminal actions, but to the satisfaction of the jury, by a preponderance of the testimony.

166 6th. To constitute a change of residence in contemplation of law, in attachment suits, there must be not only an actual change of abode, but it must also be with the intent of making it, the place to which the party removes, the fixed and permanent home of the party. That fact that his family has or has not accompanied him is a circumstance that the jury may consider in determining whether or not the change has been made in good faith. In fact, they should consider all the circumstances and testimony in determining this question.

7th. You are the exclusive judges of all the facts and circumstances and of the weight to be given to the testimony of each of the witnesses, and should take all the facts and circumstances into consideration in passing upon the question of the residence of the defendant at the time of the suing out the attachment, and as to the question whether he intended to hinder, delay, or defraud his creditors, and as to the amount due the plaintiff, if you so find.

8th. Though you may believe from the evidence that the defendant came from the State of Texas and located in Oklahoma city on or about September, 1891, and here engaged in business in the selling of goods, wares, and merchandise, yet this of itself does not constitute him a resident of the Territory of Oklahoma. To constitute him a resident of Oklahoma Territory he must, in addition to having moved here and engaged in business, have determined to make this, Oklahoma Territory, his permanent residence; and if you believe from the evidence that he left his family at Ft. Worth, in the State of Texas, and that Ft. Worth was the home of himself and family at the time he left there, and that he did not, at the time of his leaving there not at the time of the issuing of the writ of

attachment herein, intend to make Oklahoma Territory the place of his permanent residence, or if he was undetermined as to whether or not he would make Oklahoma Territory the place of his permanent residence, or that he intended to return to his home and family at Ft. Worth, Texas, at some future time, then and in that event he was a non-resident of the Territory of Oklahoma at the time the writ of attachment issued in this case.

9th. If you believe from the evidence at the time of the institution of this suit the defendant was and is now indebted to the plaintiff- for goods, wares, and merchandise purchased of plaintiff- by defendant, as charged in the complaint, then you will find for the plaintiff- in such sum as the evidence shows to be due them, with interest thereon, at the rate of seven per cent. per annum, from March 23rd, 1891, to the present.

10th. If you believe from the evidence that the defendant was selling and disposing of his goods and property and was not appropriating the proceeds of the sales to the payment of his debts and was refusing to pay his debts or secure them, then these are facts and circumstances which you may take into consideration — determining whether or not he was disposing of his property with a fraudulent intent—to cheat, hinder, or delay his creditors; and if you find from the evidence he was so doing, you will find for the plaintiff- on the issue in attachment.

11th. If the jury believe from the evidence that the defendant did not intend to make Oklahoma Territory his permanent home at the time the attachment was sued out herein, and had not come here with the intention of changing his domicil in Texas, but came here for the purpose of engaging in business temporarily and with the intent of returning to his home and family in Texas at some future time, then and in that event he is, for the purpose of attachment in this case, a non-resident of the Territory of Oklahoma.

12th. You need not be unanimous in determining what your verdict shall be. Nine of you can determine upon a verdict.

13th. Forms of verdict will be handed to you.

June 15, 1892.

JOHN G. CLARK, *Judge.*

167 The questions hereto attached you will answer by writing after each question the word "yes" or "no." You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

Your foreman will sign each of the verdicts and also this special verdict when you are agreed.

JOHN G. CLARK, *Judge.*

In the District Court in and for the County of Oklahoma and Territory of Oklahoma.

J. H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

Special Questions Submitted to the Jury.

Was J. R. Holloway on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with intent to cheat, hinder, or delay his creditors? Yes.

Was J. R. Holloway on the 31st day of October, 1891, a non-resident of Oklahoma Territory? Yes.

EUGENE WALKER, *Foreman.*

To the giving of which instructions and each of them the defendant at the time excepted.

And the defendant asked the court to give the following instructions:

168 In the District Court in and for the County of Oklahoma and Territory of Oklahoma.

J. H. DUNHAM *et al.*, Plaintiffs,
vs.
J. R. HOLLOWAY, Defendant.

You are instructed that under the law there is not sufficient evidence in this case to justify a finding by you that the defendant was about to sell or dispose of his property with intent to defraud his creditors, or that he was a non-resident of Oklahoma Territory, as charged, and therefore you are directed to find that the attachment in this action was unlawfully issued.

Gentlemen of the jury, there are two questions submitted for your consideration in this action:

1st. Was the attachment rightfully issued in this action?

2nd. How much, if any, is the defendant indebted to the plaintiff?

You are instricted that the burden of proof of both of these propositions is upon the plaintiffs, and before you can find in their favor they must prove the same by a preponderance of the evidence.

You are further instructed that fraud is never presumed, but must be proven by evidence satisfactory and convincing to your minds.

You are further instructed that if the circumstances relied upon by the plaintiff to establish the fraudulent intent are just as consistent with honesty as dishonesty of purpose, no inference of the latter arises.

You are further instructed that a party who comes into this Territory with the intention of abandoning his former residence and

residing in the Territory, but whose wife remains in his
169 former home for some months later, but who soon afterwards removes to this Territory, and with him becomes and remains an actual resident thereof, is not a non-resident and cannot be proceeded against by attachment.

To sustain the attachment plaintiffs must prove either that the defendant at the time of the issuance of the attachment, to wit, October 31st, 1891, was about to sell and convey and otherwise dispose of his property with intent to cheat, hinder, and delay his creditors, and that such property was subject to execution, or that the defendant at the time of attachment was a non-resident of the Territory of Oklahoma; failing to so find from the evidence, your finding should be that the attachment was not rightfully issued; which the court refused; to which refusal to give each and all of said instructions defendant at the time excepted.

That afterwards, to wit, the said defendant filed his motion for a new trial of said cause as follows:

In the District Court of the Third Judicial District in and for Oklahoma County, Oklahoma Territory.

JAMES H. DUNHAM *et al.*, Plaintiff,
vs.
J. R. HOLLOWAY, Defendant.

The defendant in the above-entitled action moves the court for a new trial thereof on the following grounds:

1. The court erred in refusing to grant the defendant an early hearing on his motion to discharge the attachment.

2. The court erred in ordering a trial of the question of the validity of the attachment to a jury.

3. The court erred in requiring a trial as to the validity of the attachment in conjunction with a trial as to the merits on the complaint.

4. The court erred in overruling the defendant's motion to
170 suppress the deposition of J. H. Bradley.

5. The court erred in overruling defendant's motion to suppress the deposition of James H. Dunham, J. T. Dutcher, Wm. H. Walker, and Edwin A. Davis.

6th. The court erred in allowing the exhibits attached to the deposition of James H. Dunham, J. T. Dutcher, Wm. H. Walker, and Edwin A. Davis to be read in evidence.

7. The court erred in refusing to allow the cross-interrogatories 2, 3, and 4 of the deposition of A. B. Smith to be read in evidence.

8. The court erred in refusing to allow the cross-interrogatory 1 of the deposition of James Riley to be read in evidence.

9. The court erred in refusing to allow the witness A. O. Kincaid and Mrs. White to testify as to what defendant said to them in his effort to procure a home for his family and their replies thereto.

10. The court erred in refusing all of the instructions asked for by the defendant.

11. The court erred in refusing instructions 3 and 4 asked for by defendant.

12. The court erred in giving instructions numbered 6, 8, 9, 10, and 11.

13. The assessment of the amount of recovery is erroneous, being too large.

14. The verdict of the jury on the attachment issue is not supported by sufficient evidence.

15. The verdict of the jury on the attachment issue in contrary to law.

16. The verdict of the jury on the amount of recovery is not sustained by the evidence and is contrary to law.

17. The special findings of the jury numbered 1 and 2 are not sustained by the evidence and are contrary to law.

C. A. LELAND & S. ARMSTRONG,
Attorneys for Defendant.

We hereby acknowledge service and a copy of the above motion for a new trial.

JOHNSON, HOWARD & TRAVERS,
Attorneys for Plaintiff.

171 Which said motion was submitted to the court and overruled, and defendant excepted.

Be it further remembered that on the 16th day of June, 1892, it being a judicial day of the April term of the district court—Hon. John G. Clark, judge, presiding—the following further proceedings were had in this cause: The cause being at issue, and a jury impaneled and sworn, the plaintiffs, to maintain the issues on their behalf, introduced the following evidence:

Plaintiffs offered and read in evidence the deposition of J. H. Bradley; also the depositions of James H. Dunham, J. T. Dutcher, Henry H. Walker, and Edwin A. Davis; also the depositions of A. B. Smith and James Riley. (Here insert.) To the introduction of which the defendant at the time excepted. (Here insert grounds of exception.)

And the plaintiff rested.

And the defendant, to sustain the issues on his part, introduced the following evidence:

Defendant offered and read in evidence cross-interrogatory one and the answer thereto of deponent A. B. Smith, the other cross-interrogatories and answers thereto having been excluded by the court. (Here insert all cross-interrogatories and answers thereto.)

The defendant, J. R. Holloway, testified in his own behalf as follows: (Here insert.)

The defendant offered and read in evidence Exhibit "B" as follows:

Dunham, Buckley & Co., dry goods, 340, 342, & 344 Broadway.

P. O. box 147.

NEW YORK, *Sep. 25th*, 1891.

Mr. J. R. Holloway, Oklahoma, I. T.

DEAR SIR: Your favor notifying us of your removal to Oklahoma, I. T., is at hand. We have no doubt but that it is a good move and trust you will be able *able* to realize on sales at once and send us some money.

Yours truly, DUNHAM, BUCKLEY & CO.

172 The defendant Holloway testified in cross-examination as follows: (Here insert.)

Mrs. WHITE, being called for on behalf of defendant, testified as follows: (Here insert.)

And A. O. KINCAID, being called for on behalf of defendant, testified as follows: (Here insert.)

And this was all the evidence given in the cause.

And the defendant now tenders this his bill of exceptions and prays that the same may be signed, sealed, and made a part of the record; which is done this 25th day of June, 1892.

December 27th, 1892.

JOHN G. CLARK, *Judge.*

[Endorsed:] # 333. J. H. Dunham *et al. vs.* J. R. Holloway. Bill of exceptions. Presented to the judge June 30th, 1892. Filed June 30th, 1892. Will H. Clark, clerk, by Adah Curnutt, d'p'ty.

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DUNHAM *et al.*
vs.
HOLLOWAY.

Error from Oklahoma county.

Amos Green & Son and C. A. Leland, for appellant-; J. W. Johnson, Rogers & Howard, for appellee.

1. Where an officer taking depositions fails to show in his certificate that the same were taken at the place named in the notice, and where it further appears that the adverse party was not present when such depositions were taken—held that the trial court erred in overruling a motion to suppress such deposition.

Statement of Case and Opinion by Dale, Chief Justice.

Oct. 1st, 1891, James H. Dunham, William T. Buckley, Charles Webb, and William E. Webb instituted suit in Oklahoma county against J. R. Holloway to recover judgment in the sum of $5,004.08. On the same day the plaintiffs sued out an attachment upon the goods of defendant and levied same upon his stock of merchandise located in Oklahoma city, the grounds set forth for such attachment being that defendant was about to sell, convey, and otherwise dispose of his property, subject to execution, with the fraudulent

intent to cheat, hinder, and delay his creditors, and that he was a non-resident of the Territory of Oklahoma.

Defendant entered a general denial as to the indebtedness and in a separate answer denied the grounds of attachment.

June 16, 1892, the cause came on for trial before a jury and the jury found for the plaintiff- in the sum of five thousand four hundred and thirty-four dollars and sixty-one cents ($5,434.61), and also sustained the attachment proceedings. The defendant below files his motion for new trial, which being overruled, he brings the cause here for reversal.

The assignments of error filed on the motion for a new trial may be summarized as follows:

174 In refusing to grant defendant a hearing on his motion to discharge the attachment.

In ordering a trial of the question of the validity of the attachment to a jury in conjunction with the trial as to the merits of the complaint.

In overruling defendant's motion to suppress depositions, and in refusing to allow certain cross-interrogatories in depositions to be read to the jury, and in excluding testimony on behalf of defendant, and in giving and refusing instructions to the jury.

In not setting aside an excessive judgment.

The verdict of the jury on the attachment issue is not supported by sufficient evidence and is contrary to law.

The special findings of the jury are not sustained by the evidence and are contrary to law.

Opinion of the Court.

It was not error for the trial court to overrule appellant's motion to discharge the attachment. The law under which the attachment was sued out is adopted from the Indiana Code, and the courts in construing that statute uniformly hold that proceedings in attachment are merely auxiliary to the main action, and that both the principal and attachment proceedings must be tried together.

Foster *v.* Dryfus, 16 Ind., 158.
Bradley *vs.* Bank, 20 Ind., 528.
Fork Co. *vs.* Lukrus, 38 Ind., 438.

And it follows that no error was committed by directing the cause to be tried to a jury, because either party was entitled to a jury to try the question of indebtedness, and both the main and the attachment proceedings being heard together, it follows that the two issues so joined must go to the jury where either party had demanded such jury for the trial of the cause.

Prior to the commencement of the trial the defendant below filed a motion to suppress the depositions of certain witnesses for the plaintiff, and to the ruling of the court upon such motion an

175 exception was properly saved. The depositions referred to were those of J. H. Bradley, James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis.

The depositions of the first-named witness was not taken at the same time as those were of the other witnesses.

In so far as the objection to the deposition of Bradley is concerned, we — of the opinion that it will not lie, such deposition being taken in substantial compliance with the statutes, but we think the motion to suppress the depositions of Dunham, Dutcher, Walker, and Davis should have been sustained upon the first ground stated in such motion, to wit:

"That the certificate of the notary does not show the place where the said depositions were taken."

That portion of the certificate which bears upon the question under consideration reads as follows:

"That said depositions were and each of them was carefully read to the deponent giving such testimony before he subscribed to the same and afterwards subscribed by said witnesses separately in my presence; that the defendant, J. R. Holloway, did not appear, and that the taking of said depositions commenced on Wednesday, the 30th day of December, A. D. 1891, and was finished on the same day and before 5 o'clock p. m."

Following, in the usual manner, is the name of the officer, seal, etc. Sec. 13, art. 14, Code of Civil Procedure, in force at the date of taking the depositions referred to, provides as follows:

"The officers shall annex a certificate to the deposition, stating the following facts (omitting the first three subdivisions):

"Fourth. The time and place of taking the deposition and the hours between which the same was taken, and the officer shall sign and attest the certificate and seal the same, if he have a seal of office."

The statute requiring the officer to show in his certificate the place where the deposition was taken is mandatory, and the reason therefor is so apparent that it hardly needs discussion.

This requirement is obviously for the purpose of giving the adverse party an opportunity to be present, if he wishes, when the deposition is taken, and the certificate of the officer taking such deposition would show that the terms of the notice are complied with. If the adverse party had been present a showing that the deposition was taken at the place designated in the notice would not, perhaps, be necessary, for his being present would waive
176 any irregularity in either the notice to take deposition or the certificate attached thereto, but where the adverse party does not appear he waives nothing required in the statute, and he has the right to presume that the deposition will be taken in strict conformity with the statutes, and in the absence of a certificate showing such fact may move to suppress the deposition, and such motion should be sustained.

An examination of the record discloses the fact that there is no evidence whatever showing any indebtedness upon the part of Holloway to the plaintiff below, except such as appeared in the depositions of Dunham, Dutcher, Walker, and Davis; and, as we have shown, the motion to suppress such depositions should have been sustained, and the defendant below having denied the indebtedness,

the claim of plaintiffs must be maintained by competent evidence. The judgment of the lower court must be reversed and the cause remanded for a trial *de novo*. It has been suggested that such reversal would not carry with it a new trial upon the attachment proceedings, but, the attachment being merely auxiliary to the main issue, it follows that where no judgment is obtained upon the principal question the attachment must also fail.

State *v.* Miller, 63 Ind., 475.

While other questions are raised by the bill of exceptions and assignment of errors, inasmuch as the ones discussed reverse the case, we do not deem it necessary to consider them.

Justices Burford, Scott, & Bierer concurring.

Judge McAtee not sitting.

[Endorsed:] No. 333. Dunham *et al. vs.* Holloway. Filed March 7, 1894. W. H. Ebey, clerk, by Adah Curnutt, deputy. Supreme court opinion.

177 In the Supreme Court of the Territory of Oklahoma.

JAMES H. DUNHAM *et al.*
v.
J. R. HOLLOWAY.

Syllabus.

1. Incompetent testimony—Waiver of error.—Where no exception is taken to the introduction of incompetent testimony error is waived.
2. Practice—Excepting to instructions.—Where the court gives a series of instructions, each of which is separately stated and the record of the exception reads as follows: "To the giving of which instructions and each of them the defendant at the time excepted." Held: an exception is properly saved for review by the supreme court.
3. Complaint—Sufficiency of prayer to sustain verdict.—Where an itemized account showing the dates when the several items were purchased and the time when such purchases were to be paid for is attached to and made a part of the complaint and the prayer of the complaint asks for judgment for the principal sum, together with interest thereon, according as the same may appear to be due from the items of said exhibit, held that such prayer is sufficient to support a verdict for the principal sum and interest as computed from the date when payment for each of the several items as set forth in the exhibit became due to the date of the verdict.
4. Pleading statutes of another State.—If a party to an action wishes to avail himself of the law of another State, which fixes the rate of interest upon a contract at a different rate than that fixed by the laws of the Territory, he must plead such statute.

5. Sufficiency of evidence to sustain a verdict.—Where a party sues out a writ of attachment and in his affidavit therefor sets forth two grounds for said writ, and evidence is offered in support of both grounds and the jury finds against the defendant upon each of the issues so joined, and such verdict is approved by the trial judge, this court will not disturb the verdict for the reason that the same is not supported by the evidence.

178 On petition for a rehearing.

Amos Green & Son and C. A. Leland, for appellants.
J. W. Johnson and Rogers & Howard, for appellee.

DALE, *C. J.*:

A petition for rehearing has been filed in this case, and the attention of this court has been properly called to the fact that in the consideration formerly given to the matter important testimony contained in the record was overlooked The statement of facts and assignments of error will not again be fully set out, but commented upon only sufficiently for a proper understanding of the questions discussed. In the former opinion we held that the trial court was in error in not sustaining the objections of defendant below to the introduction of the depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin Davis; that if such depositions had been rightfully excluded no evidence would appear in the record tending to establish the validity of the amount of the debt sued upon. In this conclusion we erred. In the deposition of Bradley, agent of the plaintiff, is found testimony which shows that Bradley, acting for plaintiff below, presented the account of said plaintiffs to Holloway, demanded payment therefor, and that the amount of the claim was agreed to by Holloway and payment refused simply upon the ground of inability to meet the obligation. This testimony is uncontradicted. It appears from the record that Holloway, except by his answer, raised no issue upon the question of indebtedness. The deposition- which were by the court below improperly admitted only *fo* to the question of indebtedness; they nowhere bear upon the issue raised under the attachment proceeding. Consequently the evidence contained in such depositions was cumulative, and, there being sufficient without them to prove the indebtedness, the ruling of the court below did not prejudice the rights of Holloway. We will now take up the discussion of the assignments of error not noticed in the former opinion, which are as follows:

First. Error in refusing to allow certain interrogatories in depositions to be read to the jury and excluding testimony in behalf of defendant.

179 Second. In giving and refusing instructions to the jury.

Third. In not setting aside an excessive judgment.

Fourth. Error in that the verdict of the jury on the attachment issue is not supported by sufficient evidence.

1. At the trial, upon objection, the court refused to allow certain

cross-interrogatories and answers thereto in depositions to be read to the jury. Witnesses were interrogated by the plaintiff below relative to the residence and whereabouts of defendant and his family at and about the time of the commencement of the attachment suit. The witnesses testified, in effect, that Holloway and two of his sons left Fort Worth, Texas, about the middle of September, 1891, and that the other members of his family, consisting of his wife and daughters, remained at and continued to reside in Fort Worth for some time after that dat-. By cross-interrogatories the witnesses were asked if Mr. Holloway stated when he left Fort Worth in September, 1891, that he intended to make Oklahoma city his home; which question *he* answered in the affirmative. This answer was permitted to go to the jury. The witnesses were then asked if they had heard members of Mr. Holloway's family make statements as to their intention of moving to Oklahoma; which questions were also answered in the affirmative. This testimony was excluded, and, we think, correctly. The question of the residence of Mr. Holloway alone was in issue. Proof of the residence of the family was admissible as a circumstance affecting the residence of Mr. Holloway. Beyond this it was not competent for any purpose. Statements made by members of the family as to their intention of changing their abode were clearly inadmissible because irrelevant.

Upon an examination of the record we find that counsel's assignment of error based upon the refusal of the court to allow witnesses to testify as to what Holloway said to them in connection with his efforts to procure a house at Oklahoma City is not well taken. One of the witnesses was asked to detail the conversation and an objection to the testimony was offered, and, without ruling upon such
objection, the court stated that the fact of his renting a house
180 could be proved. No exception was taken to the statement of the court limiting the proof, and, if there is error, it was waived.

2. Complaint is made of the instructions given by the court to the jury. The attachment was based upon two grounds, to wit: That Holloway was disposing of his property with the fraudulent intent to cheat, hinder, and delay his creditors, and that he was a non-resident of the Territory of Oklahoma. The instructions of the court relative to the non-residence of Holloway are particularly complained of. After the instructions were prepared they were numbered and signed by the judge, and following this there appears in the record this entry: "To the giving of which instructions and each of them the defendant at the time excepted." Then appears a full set of instructions which were presented by the defendant and the refusal of the court to give the same, to which action of the court an exception is saved. It is insisted by appellee that, under the Code of 1890, the appellant has not properly saved his objections to the instructions. We have examined all of the decisions cited in the brief of counsel for appellee and fail to find that an exception taken in the manner of the one under consideration has been passed upon by the supreme court of Indiana. — Elliott *et al. v.* Woodward (18 Ind., 183), in speaking of this ques-

tion, says: "Where instructions given by a court to a jury consist of several distinct propositions a general exception to the instructions is unavailing if any one of them is correct," citing Garrigus *v.* Burnett (9 Ind., 528), to the same effect. In Jolly *v.* The Terre Haute Drawbridge Co. (9 Ind., 471) we find the court has pointed out how exceptions must be saved in order to make them available in the supreme court.

Upon this point the court says: "It is necessary that the exception and the assignments of error based upon it should indicate each instruction deemed erroneous separately." And where an objection is made which fails to clearly designate the instructions deemed erroneous the court further in the same opinion concluded: "Unless the instructions are clearly erroneous under any hypothesis the case will not be reversed. All presumptions are resolved in favor of the
181 trial court and the correctness of the instructions," citing Murry *v.* Fry, 6 Ind., 371. In Sherlock *et al. v.* First Nat'l Bank of Bloomington (13 Ind., 73) the court again places the same construction upon the code, and particularly points out how exceptions to instructions must be taken. In Olds *v.* Deckman (98 Ind., 162) the court construes the identical statute we adopted from that State, and holds that it is substantially the same as that which had formerly been in force and upon which the decisions heretofore coted were based. The appellant is here by bill of exceptions, but the same rule relative to exceptions to instructions is laid down in Short *v.* Stutsman *et al.* (81 Ind., 115). As we view the law and the decisions based thereon, an exception to an instruction, in order to be available in the supreme court, must be taken at the time such an instruction is given and must particularly designate the instructions excepted to; but an exception as made in this case, which objects to all and each of the instructions given, is in many of the courts of last resort held to be sufficient.

The People *v.* De Fort, 64 Mich., 693.

A., T. & S. F. R. R. Co. *v.* Retford, 18 Kans., 245.

Inasmuch as the courts of Indiana have not passed upon the question here presented, we will adopt the view that an exception was properly saved and will consider the same. Just how much attention we should give to the evidence we are not entirely clear. The original bill of exceptions contained none of the evidence of the witnesses; but there appears to be a second *ro* substituted bill of exceptions containing all the evidence, and as it will make no difference in the final conclusion reached we will consider the bill of exceptions containing the transcript of the entire proceedings. We find, as before stated, two grounds set forth in the affidavit filed as a basis for the attachment—the ground of non-residence and that of the charge of fraudulently disposing of property with intent to chear, hinder, or delay creditors. Evidence was introduced tending to support both of these issues. The two issues were submitted to the jury in the form of special questions under proper instructions from the court. The jury found, on both propositions,
182 against the defendant. There being no issue as to the indebtedness if the court correctly instructed as to either

question raised in the attachment affidavit, no good reason exists for disturbing the verdict. We are not certain that the court stated the law correctly upon the question of non-residence. It appears that Holloway was in this Territory engaged in the business of merchandising, and that he had no other place of business. This Territory was the place of his residence for that purpose. In giving his instructions the court below seemed to take the view that this was not enough to make him a resident in contemplation of the attachment law. We are not certain that the court correctly stated the law upon this proposition.

Way *v.* Way, 64 Ill., 407.
Williamson *v.* Parisien, 1 Johns. Ch., 388.
Frost *v.* Brisbin, 19 Wend., 11.

It would seem that residence and domicile do not mean the same thing. The court below instructed, in effect, that a man's residence must be at the place of his home. But grant that the court was in error upon this proposition, upon which question it is unnecessary for us to pass at this time, there still remains the further question raised upon the issue of the fraudulent disposition by Holloway of his property. The instructions of the court upon this question are not subject to serious criticisms. How, then, were the rights of Holloway prejudiced by the error of the court in wrongly instructing the jury upon the question of non-residence? There were two issues decided against defendant upon the attachment. A decision upon either adverse to the defendant below would have been sufficient to carry the verdict. We therefore hold to the view that where a suit in attachment is based upon two distinct grounds and a judgment is rendered against a defendant upon both grounds alleged that error of the court in instructing as to one of such grounds is not error such as will warrant a reversal of the case.

3. It is contended that the court erred in instructing the jury that they "need not be unanimous in their verdict; that none were sufficient to return a verdict." As held by this court since this cause was tried below, such an instruction was erroneous
183 (Bradford *v.* Territory, 1 Ok., 366). But no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors. We cannot, therefore, consider the objection.

4. It is contended that the judgment was excessive. The sum sued for was $5,004.58, together with interest from the time the same became due at seven per cent. per annum. The jury returned a verdict in the sum of $5,434.61. The suit was instituted upon an account, and an itemized bill of the goods purchased was attached to and made a part of the complaint. The time of such purchase and the dates when the several items so purchased were to be paid for *was* set forth. The prayer of the complaint asked for judgment for the sum of $5,004.58, "with interest thereon, according as the same may appear to be due from the items of said exhibit, at the rate of seven per cent. per annum." The exhibit so attached to the com-

plaint is as much a part of the same as if incorporated in the complaint.

Budd *v.* Cramer, 14 Ks., 101.
State *v.* School Dist. No. 3, 34 Ks., 237.

By reference to the exhibit for the purpose of ascertaining the date when each purchase became payable and computing the interest no trouble is found in determining the exact sum sued for. Therefore the defendant was fully apprized of what plaintiffs were claiming, and the jury could, by a simple mathematical computation, arrive at a correct conclusion. Such being the case, the verdict was not excessive unless the jury made an error in figuring the interest. We have not examined for the purpose of determining just what the interest on the different sums amounted to from the date they fell due until the time of the verdict, but if there was an excess of interest allowed the plaintiffs below should be directed to file a remitter.

5. Counsel for appellant insist that interest should be computed at six per cent., as that is the law of the State of New York, the place where the contract was made. Six per cent. may be the rate of interest in the State of New York, but, if so, counsel should have
184 plead the statute. In the absence of such pleading and proof we will presume that the rate of interest in the State of New York is the same as in Oklahoma.

6. As heretofore stated, evidence was offered upon the trial in support of both grounds set forth in the affidavit for attachment. The jury found against the defendant upon each of the propositions. The trial judge approved the verdict. This court will not set aside a verdict reached under these conditions upon the ground that it is contrary to the evidence. The decision heretofore reached in this case is set aside, and the judgment of the lower court is affirmed.

The other justices concurring.

[Endorsed:] Filed July 27th, 1895. Edgar W. Jones, clerk supreme court.

185 TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the Supreme Court of the Territory of Oklahoma.

J. R. HOLLOWAY, Appellant,
vs.
JAMES DUNHAM *et al.*, Appellees. } Notice of Application for Rehearing.

To attorneys of appellee-:

You are hereby notified of the intention of appellant to make application for a rehearing in the above-entitled case.

AMOS GREEN & SON,
Attorneys for Appellant.

Service and receipt of a copy of this notice hereby acknowledged this 31st day of July, 1895.

SELWYN DOUGLAS,
Attorney for Appellee-.

186 TERRITORY OF OKLAHOMA:

In the Supreme Court of the Aforesaid Territory.

J. R. HOLLOWAY, Appellant,
vs.
JAMES H. DUNHAM, Appellee.
} Petition for Rehearing.

The appellant, J. R. Holloway, petitions the court to grant a rehearing in the above-entitled cause. He respectfully represents that the court in its opinion erred upon the following points, to wit:

First. In holding that there was any evidence introduced on the trial of the case in the court below to show that appellant was disposing of his property with intent to hinder, delay, and defraud his creditors, and for that reason, although the trial court erred in instructing the jury as to what constituted residence within the meaning of the provisions of the statute making non-residence one of the grounds for attachment, the attachment proceedings would be upheld.

Second. That appellant was not served with notice, as required by rule eighteen of the supreme court, within fifteen days after the decision reversing said judgment or at any time, and was not afforded an opportunity to file a brief or argue the same orally, or was counsel for appellant ever notified that said rehearing had ever been granted, as required by the aforesaid rule of the supreme court.

Wherefore the appellant asks that a rehearing be granted in the above-entitled case, so that an opportunity may be afforded him to show the fact that there is not any evidence in the record showing any fraudulent disposal of his property, and that no attempt was made on the trial of the case to show this fact by appellee, but that the finding of the jury was wholly based on the question of the residence of appellant.

AMOS GREEN & SON,
Attorneys for Appellant.

[Endorsed:] J. R. Holloway, appellant, *vs.* James H. Dunham, appellee. Petition for rehearing. Filed Aug. 19, 1895. Edgar W. Jones, clerk. Amos Green & Son, att'ys for appellant.

187 TERRITORY OF OKLAHOMA:

In the Supreme Court of the Aforesaid Territory.

J. R. HOLLOWAY, Appellant,
vs.
JAMES H. DUNHAM, Appellee.
} Order for Rehearing.

The matter of the application by appellant for a rehearing in the above-entitled case having been heard by me, and the petition filed by appellant setting forth the grounds on which appellant bases his application having been examined by me, and it appearing from

an examination of the same that a re-argument of the same, in my opinion, would be advisable, it is therefore ordered that the judgment of the supreme court in the above-entitled case be stayed and superseded until a re-argument of the aforesaid case is had in the supreme court.

H. W. SCOTT, *Judge.*

[Endorsed:] J. R. Holloway, appellant, *vs.* James H. Dunham, appellee. Order for rehearing. Filed August 19, 1895. Edgar W. Jones, clerk.

188 TERRITORY OF OKLAHOMA, *County of Oklahoma,* } *ss:*

In the Supreme Court of the Territory of Oklahoma.

JOHN R. HOLLOWAY, Appellant,
vs.
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Appellees.

Know all men by these presents that John R. Holloway, as principal, and John P. Johnson, Benj. D. Williams, and J. C. Misse, as sureties, are held and firmly bound unto James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb in the full and just sum of fifteen thousand ($15,000) dollars, to be paid to said James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, their heirs, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Now, the condition of the above obligation is such that whereas lately, at the January term of the aforesaid court, in a suit depending in said court between John R. Holloway, appellant, and James H. Dunham, William T. Buckley, Charles E. Webb, and William E. Webb, appellees, the judgment of the district court of Oklahoma county and Territory against said John R. Holloway was affirmed by the aforesaid court, and the said John R. Holloway has appealed to the Supreme Court of the United States to reverse the affirmance and judgment in the aforesaid cuit, and citation directed to said James Dunham, William T. Buckley, Charles H. Webb, and William E. Webb, citing and admonishing them to be and appear in the Supreme Court of the United States, at Washington, in the District of Columbia, thirty days from and after the date of said citation:

189 Now, the condition of the above obligation is such that if the said John R. Holliway shall prosecute said appeal to effect and pay any judgment and all damages and costs if he fail to

make good his plea, then the above obligation to be void; else to remain in full force and virtue.

J. R. HOLLOWAY. [SEAL.]
JOHN P. JOHNSON. [SEAL.]
BENJ. D. WILLIAMS. [SEAL.]
JOHN C. MISSE. [SEAL.]

Signed, sealed, and delivered in the presence of—
Witness-:
JAMES A. LEONARD.
WILL P. JAMES.

190 TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

In the Supreme Court of the Territory of Oklahoma.

JOHN R. HOLLOWAY, Appellant,
vs.
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES H. WEBB, and WILLIAM E. WEBB, Appellees.

John T. Johnson, being firs*y* duly sworn, deposes and says that he is worth the sum of fifty thousand ($50,000) dollars and more, too, over and above all just claims, debts, liabilities, and exemptions; that he has the following property subject to execution, to wit, 2,560 acres of land, situate and being in the State of Kansas and more particularly described as follows, to wit:

940 acres of land in Doniphan county, mostly in cultivation and estimated to be worth $40 per acre.

320 acres in Marshall county, Ks., estimated to be worth $40 per acre.

160 acres in Washington Co., Ks., estimated to be worth $30 per acre.

160 acres in Jewell Co., Ks., estimated to be worth $30 per acre.

800 acres in Norton Co., Ks., estimated to be worth $25 per acre, mostly in cultivation.

160 acres in Decatur Co., Ks., estimated to be worth $20 per acre.

320 acres in Sheridan Co., Ks., estimated to be worth $25 per acre.

640 acres in Graham Co., Ks., estimated to be worth $20 per acre.

26,580 acres in the State of Missouri and more particularly described as follows, to wit:

One farm, 580 acres, in Clay Co., estimated to be worth $100 per acre.

11,500 acres in Shannon Co., estimated to be worth $10 per acre.

14,500 acres in Laclede Co., estimated to be worth $10 per acre.

1,900 acres in the State of Nebraska, more particularly described as follows, to wit:

One farm in Richardson Co., 1,500 acres, estimated to be worth $50 per acre.

One farm in Harlan Co., 400 acres, estimated to be worth $25 per acre.

That I am the owner of what is known and called the banking-house of John P. Johnson, situate and being in the city of Highland, Kansas. I have been a banker thirty-eight years.

JOHN P. JOHNSON.

Subscribed and sworn to before me this 28th day of May, 1896.

JAMES L. ALLEN,
[SEAL.] *Notary Public.*

Term ends Aug. 17, 1899.

191 Banking-house of John P. Johnson.

HIGHLAND, KANSAS, *May* 28, 1896.

There not being sufficient room in the space in the affidavit on the bond to give a description of the lands I own in the various counties and States in which I own lands, as shown in the recorders' offices of the counties named below, I add this sheet also. Now, to give the Nos. of the lands by sections, townships, & ranges would fill several sheets of foolscap paper. I own in Doniphan Co., Kans., 940 acres, estimated at $40 per acre.

Marshall Co., Kans., 320 acres, worth $40 per acre.
Washington Co., Kans., 160 acres, worth $30 per acre.
Jewell Co., Kans., 160 acres, worth $30 per acre.
Norton Co., Kans., 800 acres, worth $25 per acre.
Decatur Co., Kans., 160 acres, worth $20 per acre.
Sheridan Co., Kans., 320 acres, worth $25 per acre.
Graham Co., Kans., 640 acres, worth $20 per acre.
(Carried over on the other side.)

In the State of Missouri:

Clay Co., near Kansas City, 580 acres, worth $100 per acre.
Shannon Co., pine lands, 11,500 acres, worth $10 per acre.
Laclede Co., pine lands, 14,500 acres, worth $10 per acre.

In the State of Nebraska:

Richardson Co., a farm, valuable, 1,500 acres, worth $50 per acre.
Harlan Co., a farm, valuable, 400 acres, worth $25 per acre.

So you or any court may judge whether the undersigned is worth $50,000 or not.

I am the man that the Government commissioned and sent out to Kans. and Neb. Territories 42 years ago to prepare the way
192 for the U. S. surveys by establishing the 6 principal meridian standard paral-el's & set the surveys agoing, and I made a selection of the best lands & purchased them. I am not only a banker & land man, but I have cattle ranches & mule ranches, and I presume any judge or court will pronounce the securities to J. R. Holloway's bond good.

I write this sheet because my cashier had not room to give much of a description in the affidavit in bond.

Your humble servant, JOHN P. JOHNSON.

P. S.—I have also 15,000 acres of the best land in Fla., and I own lands in Texas and a good house and lot in Shannon, and the cyclone did not damage the house either. I own more lands in Mo. than given on the other side in affidavit. I pay over $8,000 taxes per year. So you may judge whether I am good for $50,000. I never gave a mortgage on anything in my life. My lands are clear and all taxes paid. Now I go J. R. Holloway's bond because I have known him for 45 years, and have always known him to be honest, honorable, and straight in all business matters. At Danville, Ill., he was a wholesale merchant for years.

Now, in giving some description of the lands I own in the various States I have not given the Nos. by sections and townships because there was not room. If the exact description were given, it would fill several pages. But the records in the recorders' offices will give the exact Nos. and description of the lands, &c., in each county.

JOHN P. JOHNSON.

193 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the Supreme Court of the Territory of Oklahoma.

J. R. HOLLOWAY, Appellant, }
vs. }
JAMES H. DUNHAM, Defendant. }

Benj. D. Williams, being first duly sworn, deposes and says that he is worth the sum of ten thousand ($10,000) dollars over and above all just claims, debts, liabilities, and exemptions; that he has the following property subject to execution in the State of Kansas, in Doniphan county, to wit, real estate and personal property, all clear of incumbrance of every nature and kind and worth more than $10,000.

BENJ. D. WILLIAMS.

Subscribed and sworn to before me this 6th day of May, 1896.

H. S. HOGUE,
[SEAL.] *Notary Public.*

Term ends Sept. 29, 1897.

194 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County, }

In the Supreme Court of the Territory of Oklahoma.

J. R. HOLLOWAY, Appellant,
vs.
JAMES H. DUNHAM, Defendant.

John C. Misse, being first duly sworn, deposes and says that he is worth the sum of twenty thousand ($20,000) dollars over and above all just claims, debts, liabilities, and exemptions; that he has the following property subject to execution in the county of Doniphan and State of Kansas, to wit: I own real estate and personal property clear of incumbrance of every nature and kind and worth $20,000, and more, too.

JOHN C. MISSE.

Subscribed and sworn to before me this 6th day of May, 1896.

[SEAL.] H. S. HOGUE,
Notary Public.

Term ends Sept. 29, 1897.

[Endorsed:] John R. Holloway *vs.* James H. Dunham, William T. Buckley, Charles H. Webb, and William E. Webb. Appeal bond. June 12, 1896. Approved. Frank Dale, chief justice. Filed June 12th, 1896. Edgar W. Jones, clerk sup. court.

195 J. R. HOLLOWAY
vs.
JAMES H. DUNHAM *et al.* } # 77.

And now, on this 21st day of June, 1893, leave was granted by the court to file motion by appellees herein to affirm the judgment of the court below.

196 J. R. HOLLOWAY, Appellant,
vs.
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, *et al.*, Appellees.

And now, on this 30th day of June, 1893, this cause came on for decision upon the motion to affirm the judgment of the court below. Thereupon it was ordered by the court that said motion be overruled. Thereafter a stipulation was filed by the parties that answer to the assignments of error and briefs may be filed by appellee by July 7th, 1893, and appellant may file additional briefs, and that appellant was permitted to withdraw the record for the purpose of examination in the preparation of briefs. Thereafter the cause was argued by Amos Green, Esq., and submitted for the consideration of the court upon the record filed and briefs to be filed.

197 JAMES H. DUNHAM *et al.*, Appellant, *vs.* J. R. HOLLOWAY, Appellee. } # 77. Appeal from the District Court of Oklahoma County.

And now, on this the 3rd day of March, A. D. 1894, the above cause having come on for final judgment and decision, it was held by the court that the judgment of the lower court be reversed and the case remanded.

This opinion was read by Chief Justice Dale, all the judges concurring, and can be found on page —, Book of Opinion, and a part of this record.

198 JAMES H. DUNHAM *et al.*, Appellants, *vs.* J. R. HOLLOWAY, Appellee. } # 77.

And now, on this the 22nd day of June, 1894, the above cause having come on for consideration upon a motion for rehearing, the court, after consideration, orders and adjudges that the petition be allowed; anove cause to be taken and considered without further argument or briefs.

199 JAMES H. DUNHAM *et al.* *vs.* J. R. HOLLOWAY. } # 77. From District Court of Oklahoma County.

And now, to wit, on this 23rd day of June, 1894, the above cause coming on to be heard upon a motion for review and rehearing, it was held by the court that said cause be reinstated and resubmitted at this time; said cause to be submitted without further argument or briefs.

200 JAMES H. DUNHAM *et al.*, Appellants, *vs.* J. R. HOLLOWAY, Appellee. } # 77.

And now, to wit, on this the 27th day of July, 1895, the above cause having come on for final decision and the court being fully advised in the premises, it is therefore held, ordered, and adjudged that the judgment of the lower court be, and the same is, in all things affirmed, at cost of above appellants. Opinion by Dale, C. J., all the justices concurring.

201 JAMES H. DUNHAM *et al.* *vs.* J. R. HOLLOWAY. } # 77.

And now, to wit, on this the 17th day of January, 1896, the above cause having come on for decision upon a motion for review and rehearing, and the court being fully advised in the premises, it is therefore held, ordered, and adjudged that the said motion be, and the same is, in all things denied with costs.

202 TERRITORY OF OKLAHOMA :

Supreme Court.

I, the undersigned, clerk of the supreme court of the Territory of Oklahoma, do hereby certify the above and foregoing to be a true, complete, and correct copy of the entire record, including the journal entries, opinions, etc., in case # 77, James H. Dunham *et al. vs.* J. R. Holloway, as shown by the records of this office.

Given under my hand and the seal of said court at my office, in the city of Guthrie, this 4th day of September, A. D. 1896.

[Seal Supreme Court, Territory of Oklahoma.]

EDGAR W. JONES,
Clerk of the Supreme Court.

Endorsed on cover: Case No. 16,407. Oklahoma Territory supreme court. Term No., 247. John R. Holloway, plaintiff in error, *vs.* James H. Dunham, William T. Buckley, Charles Webb, and William E. Webb. Filed October 15th, 1896.

No. 247.

APR 21 1898
JAMES H. McKENNEY,
CLERK

Brief of Beall for P. E.

Filed April 21, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1897.

JOHN R. HOLLOWAY,
Plaintiff in Error,

vs.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB AND WILLIAM E. WEBB,
Defendants in Error.

No. 247.

In Error to the Supreme Court of the Territory of Oklahoma.

BRIEF FOR PLAINTIFF IN ERROR.

FRED BEALL,
AMOS GREEN,
C. M. GREEN,
Attorneys for Plaintiff in Error.

Saxton Printing Co.,
619 E Street N. W.

...IN THE...

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN R. HOLLOWAY,
Plaintiff in Error,

vs.

JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB AND WILLIAM E. WEBB,
Defendants in Error.

No. 247.

In Error to the Supreme Court of the Territory of Oklahoma.

STATEMENT.

This is an attachment at law by Dunham, Buckley & Co., merchants of New York, against John R. Holloway, to recover an alleged indebtedness of $5,004.58, by open account for merchandise alleged to have been sold Holloway in 1890 and 1891, while doing business as a merchant at Fort Worth, Texas.

In September, 1891, Holloway transferred his business from Fort Worth, Texas, to Oklahoma, Oklahoma Territory, of which he wrote Dunham, Buckley & Co., receiving from them a letter as follows:

"NEW YORK, Sept. 25, 1891.

MR. J. R. HOLLOWAY,

Oklahoma, I. T.:

DEAR SIR:—Your favor, notifying us of your removal to Oklohoma, I. T., is at hand. We have no doubt that it is a good move, and trust you will be able to realize on sales at once and send us some money.

Yours truly,

DUNHAM, BUCKLEY & CO. (Rec., 87.)"

October 31, 1891, defendants in error brought suit in the district court of Oklahoma county, O. T., and on the same day obtained an order of attachment, and had the entire stock of goods of Holloway seized. The affidavit for attachment alleged that Holloway was indebted to Dunham, Buckley & Co. in the sum of $5,004.58 principal, and $183.18 interest, for goods and merchandise sold and delivered by the plaintiff to the defendant "at various times between November 1st, 1890, and March 10, 1891, and that the said defendant, J. R. Holloway, is about to sell, convey, and otherwise dispose of his property subject to execution, with the fraudulent intent to cheat and hinder and delay his creditors; and that said J. R. Holloway is a non-resident of said Territory of Oklahoma." (Rec., p. 8.)

November 5, 1891, Holloway filed a general denial, duly verified by his own oath, to the petition or complaint of plaintiffs (Rec., p. 13.) November 23, 1890, he filed a duly verified traverse of the affidavit for attachment, thus:

"1st. He denies each and every allegation in plaintiff's affidavit for attachment.

"2d. That the grounds alleged in plaintiff's affidavit for attachment are each and every one wholly untrue.

"Wherefore, the defendant demands judgment in the attachment proceedings."

The plaintiffs gave notice that they would take the depositions of J. H. Bradley, J. H. Dunham, J. T. Dutcher, Henry H. Walker, and Edwin Davis, all of New York, and did take the depositions of said persons. (Rec., pp. 31–74.) The defendant made motions to suppress the depositions of each and all of the New York witnesses, assigning as grounds of motion in each, that the deposition was not taken in compliance

with law; that defendant had not been notified of the time and place of taking said depositions; and that none of said depositions were legally or properly certified. (Rec., pp. 22–23.)

The trial court overruled said motion by the following order:

"Now, on this 13th day of June, A. D. 1892, this cause came on for hearing on the motion of defendant to suppress the depositions of J. H. Dunham, John T. Dutcher, Henry H. Walker, and Edwin A. Davis, heretofore filed herein, and after argument of counsel, it is considered, ordered, and adjudged by the court that said motion be, and the same hereby is overruled; to which judgment and order of the court overruling said motion the defendant duly excepted and excepts.

JOHN G. CLARK, Judge." (Rec., 17.)

The record (p. 28), recites:

"The cause being at issue, and a jury empanneled and sworn, the plaintiffs, to maintain the issues on their behalf, introduced the following evidence:

"Plaintiffs offered and read the deposition of J. H. Bradley; also the depositions of James H. Dunham, J. T. Dutcher, Henry H. Walker, and Edwin A. Davis; also the depositions of A. B. Smith and James Riley. To the introduction of which the defendant, at the time, excepted."

The testimony having been introduced, the court gave the jury, in writing, 14 instructions (Rec., pp. 24–25), among which were the following:

Gentlemen of the jury, I instruct you as follows:

1st. This action was commenced for the purpose of recovering the purchase price of certain goods alleged by the plaintiff Dunham to have been sold to the defendant, J. R. Holloway.

2d. To secure the collection of said debt, should the plaintiff recover judgment, the goods of the defendant were attached upon two grounds.

1st. That the said defendant was not a resident of this Territory.

2d. That he was fraudulently disposing of his property with intent to cheat, hinder, or delay his creditors.

3d. You are trying two issues:

1st. Whether or not the attachment herein shall be sustained.

2d. Whether or not at the time of the commencement of this suit and at the present time the defendant was and is indebted to plaintiffs; and, if so, in what sum? and upon these two issues you will make separate verdicts.

5th. If you shall find from the evidence that the defendant at the time of the issuing of the writ of attachment herein was a non-resident of the Territory of Oklahoma, you will find the issue for the plaintiffs on this attachment; or if you find from the evidence — was disposing of his property subject to execution with the fraudulent intent to cheat, hinder, or delay his creditors at the time of the issuing of the writ of attachment herein, you will find the issue for the plaintiffs in the attachment.

7th. To constitute a change of residence in contemplation of law, in attachment suits, there must not only be an actual change of abode, but it must also be with the intent of making it, the place to which the party removes, the fixed and permanent home of the party. The fact that his family has or has not accompanied him is a circumstance that the jury may consider in determining whether or not the change has been made in good faith. In fact, they should consider all the circumstances and testimony in considering this question.

8th. You are the exclusive judges of all the facts and circumstances and of theweight to be given to the testimony of each of the witnesses, and should take all the facts and circumstances into consideration in passing upon the question of the residence of the defendant at the time of the suing out of the attachment, and as to the question as to whether he intended to hinder, delay, or defraud his creditors, and as to the amount due the plaintiff if you so find.

9th. Though you may believe from the evidence that the defendant came from the State of Texas and located in Oklahoma City on or about September, 1891, and here engaged in business in the selling of goods, wares, and merchandise, yet

this of itself does not constitute him a resident of the Territory of Oklahoma. To constitute him a resident of the Oklahoma Territory he must, in addition to having moved here and engaged in business, had determined to make this, Oklahoma, Territory, his permanent residence; and if you believe from the evidence that he left his family at Ft. Worth, in the State of Texas, and that Ft. Worth was the home of himself and family at the time he left there, and that he did not, at the time of his leaving there nor at the time of the issuing of the writ of attachment herein, intend to make Oklahoma Territory the place of his permanent residence, or if he was undetermined as to whether or not he would make Oklahoma Territory the place of his permanent residence, or that he intended to return to his home and family at Ft. Worth, Texas, at some future time, then and in that event he was a non-resident of the Territory of Oklahoma at the time the writ of attachment issued in this case.

10th. If you believe from the evidence at the time of the institution of this suit the defendant was and is now indebted to the plaintiffs for goods, wares, and merchandise purchased of plaintiffs by defendant, as charged in said complaint, then you will find for the plaintiffs in such sum as the evidence shows to be due them, with interest thereon, at the rate of seven per cent per annum, from March 23rd, 1891, to the present.

11th. If you believe from the evidence that the defendant was selling and disposing of his goods and property and was not appropriating the proceeds of the sales to the payment of his debts and was refusing to pay his debts or secure them, then these are facts and circumstances that you may take into consideration in determining whether or not he was disposing of his property with a fraudulent intent—to cheat, hinder or delay his creditors; and if you find from the evidence he was so doing, you will find for the plaintiff on the issue in attachment.

12th. If the jury believe from the evidence that the defendant did not intend to make Oklahoma his permanent home at the time the attachment was sued out herein, and had not come here with the intention of changing his domicile in

Texas, but came here for the purpose of engaging in business temporarily and with the intent of returning to his home and family in Texas at some future time, then and in that event he is, for the purpose of attachment in this case, a non-resident of the Territory of Oklahoma.

13th. You need not be unanimous in determining what your verdict shall be. Nine of you can determine upon a verdict.

14th. Forms of verdict will be handed to you.

June 15, 1892.

JOHN G. CLARK, *Judge.*

The questions hereto attached you will answer by writing after each question the words "yes" or "no." You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

Your foreman will sign each of the verdicts and also this special verdict when you are agreed.

JOHN G. CLARK, *Judge.*

Special Questions Submitted to the Jury.

Was J. R. Holloway, on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with intent to cheat, hinder, or delay his creditors?

Was J. R. Holloway, on the 31st day of October, 1891, a non-resident of Oklahoma Territory?

To the giving of which instructions and each of them the defendant at the time excepted.

The jury having found for the plaintiffs, the court entered judgment as follows:

"Now, at this day, this cause coming on to be heard and the plaintiffs appearing, by their attorneys, and the defendant appearing in his own proper person and by his attorneys, and the defendant requesting a jury, all and singular the issues herein made by the plaintiffs' complaint and affidavit for attachment and defendant's answer, traversing and denying all and singular the matters alleged in plaintiffs' said complaint

and affidavit for attachment, are submitted to a jury ; and the jury, after hearing the evidence, the instructions of the court, and the argument of counsel, retire to consider of their verdicts, and, after considering of the same, return into the court the following verdicts :

" We, the jury, duly empaneled and sworn in the above case, find for the plaintiffs on the attachment issue.

EUGENE WALKER, *Foreman.*"

" We, the jury, duly empaneled and sworn in the above-entitled cause, find for the plaintiffs, and assess their damages at $5,434.61.

EUGENE WALKER, *Foreman.*"

And the court, at the instance of the defendant, having submitted in writing to the jury the following questions :

" Was J. R. Holloway on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution with the intent to cheat, hinder, and delay his creditors?

" Was J. R. Holloway on the 31st day of October, 1891, a non-resident of Oklahoma Territory? "

The jury at the time of rendering their verdict as aforesaid, returned as their special finding to each of said questions the answer " Yes; " which said questions, with the answer " yes " thereto, were separately and severally signed " Eugene Walker, foreman."

" Wherefore the court doth find," etc. (Rec., pp. 11–12).

The defendant made a motion for new trial, assigning among other causes the following :

" 4. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

" 5. The court erred in overruling defendant's motion to suppress the depositions of James H. Dunham, J. T. Dutcher, Wm. H. Walker, and Edwin A. Davis.

" 12. The court erred in giving instructions numbered 6, 8, 9, 10 and 11.

" 13. The assessment of the amount of recovery is erroneous, being too large.

" 14. The verdict of the jury on the attachment issue is not supported by sufficient evidence.

" 15 The verdict of the jury on the attachment issue is contrary to law.

" 16. The verdict of the jury on the amount of recovery is not sustained by the evidence and is contrary to law.

"17. The special findings of the jury numbered 1 and 2 are not sustained by the evidence and are contrary to law." (Rec., pp. 27–28).

This motion being overruled, a general bill of exceptions was taken, signed and sealed according to law, embodying all the proceedings at the trial, not made by law a part of the record, including all the testimony. (Rec., pp. 21–90.)

From the judgment of the district court the case was carried by the defendant Holloway, by appeal, to the Supreme Court of Oklahoma, where it was heard upon a complete record, and assignment of errors. Among the errors assigned in the Supreme Court of Oklahoma were the following:

Third. The court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

Fourth. The court erred in overruling the defendant's motion to suppress the depositions of J. H. Dunham, J. T. Dutcher, Wm. Walker, and Edwin A. Davis.

Fifth. The court erred in allowing the exhibit attached to the depositions of James H. Dunham, J. T. Dutcher, W. H. Walker, and Edwin A. Davis to be read in evidence.

Eleventh. The court erred in giving each and all the instructions numbered 6, 8, 9, 10, and 11 to the jury over the objections of the defendant.

Twelfth. The court erred in giving and entering judgment for the amount it did, which is unauthorized by the evidence in the case, and in excess of any amount shown by the evidence to be due.

Thirteenth. The verdict of the jury on sustaining the attachment and the judgment of the court thereon is contrary to the law and evidence of the case.

Fourteenth. The verdict and findings of the jury and the judgment of the court thereon are contrary to the evidence and law of the case.

Fifteenth. The special findings of the jury numbered one and two are unwarranted and unsustained by the evidence and contrary to law.

Sixteenth. The instructions given to the jury by the court

as a whole are misleading and do not correctly state the law applicable to the evidence and issues in the case.

Seventeenth. The court erred in overruling defendant's motion for a new trial and rendering judgment upon the illegal findings and verdict of the jury.

Nineteenth. The complaint and exhibits thereto attached and the evidence in the case show that the contract and purchase of the goods, wares, and merchandise was in the State of New York and governed by the laws of the State of New York, under which laws only six per cent interest can be allowed and collected, and the court erred in allowing interest on said account at the rate of seven per cent per annum.

Twentieth. The court erred in rendering judgment for more than the amount claimed in the complaint and interest thereon, and more than the evidence and accounts filed as exhibits show to be due.

Twenty-first. Said judgment is not sustained by the proof, nor authorized by the complaint nor evidence in the case and is erroneous. (Rec., pp. 92–93.)

The Territorial Supreme Court first reversed the district court, and remanded the case for a new trial, as shown by the following extracts from the opinion of the court:

"Prior to the commencement of the trial the defendant below filed a motion to suppress the depositions of certain witnesses for the plaintiff, and to the ruling of the court upon such motion an exception was properly saved. The depositions referred to were those of J. H. Bradley, James H. Dunham, John T. Dutcher, Henry Walker, and Edwin A. Davis.

"The deposition of the first-named witness was not taken at the same time as those were of the other witnesses.

"In so far as the objection to the deposition of Bradley is concerned, we are of the opinion that it will not lie, such deposition being taken in substantial compliance with the statutes, but we think the motion to suppress the depositions of Dunham, Dutcher, Walker and Davis should have been sustained upon the first ground stated in such motion, to wit:

"That the certificate of the notary does not show the place where the said depositions were taken.

"An examination of the record discloses the fact that there

is no evidence whatever showing any indebtedness upon the part of Holloway to the plaintiff below, except such as appeared in the depositions of Dunham, Dutcher, Walker and Davis; and, as we have shown, the motion to suppress such depositions should have been sustained, and the defendant below having denied the indebtedness, the claim of the plaintiffs must be maintained by competent evidence. The judgment of the lower court must be reversed and the cause remanded for a trial *de novo*." (Rec. 103–104–105).

Upon a rehearing of the case the Territorial Supreme Court set aside its former judgment, and affirmed the judgment of the district court on the grounds that independent of the depositions which had been erroneously admitted by the trial court, there was sufficient evidence to establish the account sued on. The material parts of the opinion of the court are as follows:

In the former opinion we held that the trial court was in error in not sustaining the objections of defendant below to the introduction of the depositions of James H. Dunham, John T. Dutcher, Henry Walker, and Edwin Davis; that if such depositions had been rightfully excluded no evidence would appear in the record tending to establish the validity of the amount of the debt sued upon. In this conclusion we erred. In the deposition of Bradley, agent of the plaintiff, is found testimony which shows that Bradley, acting for plaintiff below, presented the account of said plaintiffs to Holloway, demanded payment therefor, and that the amount of the claim was agreed to by Holloway and payment refused simply upon the ground of inability to meet the obligation. This testimony is uncontradicted. It appears from the record that Holloway, except by his answer, raised no issue upon the question of indebtedness. The depositions which were by the court below improperly admitted only go to the question of indebtedness; they nowhere bear upon the issue raised under the attachment proceeding. Consequently the evidence contained in such depositions was cumulative, and, there being sufficient without them to prove the indebtedness, the ruling of the court below did not prejudice the rights of Holloway. We will now

take up the discussion of the assignments of error not noticed in the former opinion, which are as follows:

Complaint is made of the instructions given by the court to the jury. The attachment was based upon two grounds, to wit: That Holloway was disposing of his property with the fraudulent intent to cheat, hinder, and delay his creditors, and that he was a non-resident of the Territory of Oklahoma. The instructions of the court relative to the non-residence of Holloway are particularly complained of. After the instructions were prepared they were numbered and signed by the judge, and following this there appears in the record this entry: "To the giving of which instructions and each of them the defendant at the time excepted."

We find, as before stated, two grounds set forth in the affidavit filed as a basis for the attachment—the ground of non-residence and that of the charge of fraudulently disposing of property with intent to cheat, hinder, or delay creditors. Evidence was introduced tending to support both of these issues. The two issues were submitted to the jury in the form of special questions under proper instructions from the court. The jury found, on both propositions, against the defendant. There being no issue as to the indebtedness, if the court correctly instructed as to either question raised in the attachment affidavit, no good reason exists for disturbing the verdict. We are not certain that the court stated the law correctly upon the question of non-residence. It appears that Holloway was in this territory, engaged in the business of merchandising, and that he had no other place of business. This territory was the place of his residence for that purpose. In giving his instructions, the court below seemed to take the view that this was not enough to make him a resident in contemplation of the attachment law. We are not certain that the court correctly stated the law upon this proposition.

Way *v.* Way, 64, Ill., 407.
Williamson *v.* Parisien, 1 Johns. Ch., 388.
Frost *v.* Brisbin, 19 Wend., 11.

It would seem that residence and domicile do not mean the same thing. The court below instructed, in effect, that a

man's residence must be at the place of his home. But grant that the court was in error upon this proposition, upon which question it is unnecessary for us to pass at this time, there still remains the further question raised upon the issue of the fraudulent disposition by Holloway of his property. The instructions of the court upon this question are not subject to serious criticisms. How, then, were the rights of Holloway prejudiced by the error of the court in wrongly instructing the jury upon the question of non-residence? There were two issues decided against defendant upon the attachment. A decision upon either adverse to the defendant below would have been sufficient to carry the verdict. We therefore hold to the view that where a suit in attachment is based upon two distinct grounds and a judgment is rendered against a defendant upon both grounds alleged that error of the court in instructing as to one of such grounds, is not error such as will warrant a reversal of the case.

3. It is contended that the court erred in instructing the jury that they "need not be unanimous in their verdict; that nine were sufficient to return a verdict." As held by this court since this cause was tried below, such an instruction was erroneous. (*Bradford* v. *Territory*, 1 Ok., 366.) But no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors. We cannot ,therefore, consider the objection.

4. It is contended that the judgment was excessive. The sum sued for was $5,004.58, together with interest from the time the same became due at seven per cent per annum. The jury returned a verdict in the sum of $5,434.61. The suit was instituted upon an account, and an itemized bill of the goods purchased was attached to and made a part of the complaint. The time of such purchase and the dates when the several items so purchased were to be paid for *was* set forth. The prayer of the complaint asked for judgment for the sum of $5,004.58, "with interest thereon, according as the same may appear to be due from the items of said exhibit, at the rate of seven per cent per annum." The exhibit so attached to the

complaint is as much a part of the same as if incorporated in the complaint.

Budd *v.* Cramer, 14 Ks., 101.
State *v.* School Dist., No., 3, 34 Ks., 237.

By reference to the exhibit for the purpose of ascertaining the date when each purchase became payable and computing the interest no trouble is found in determining the exact sum sued for. Therefore the defendant was fully apprized of what plaintiffs were claiming, and the jury could, by a simple mathematical computation, arrive at a correct conclusion. Such being the case, the verdict was not excessive unless the jury made an error in figuring the interest. We have not examined for the purpose of determining just what the interest on the different sums amounted to from the date they fell due until the time of the verdict, but if there was an excess of interest allowed, the plaintiffs below should be directed to file a remitter.

5. Counsel for appellant insist that interest should be computed at 6 per cent, as that is the law of the State of New York, the place where the contract was made. Six per cent may be the rate of interest in the State of New York, but, if so, counsel should have plead the statute. In the absence of such pleading and proof, we will presume that the rate of interest in the State of New York is the same as in Oklahoma. (Rec., p. 106–110)

From the judgment of the Supreme Court of Oklahoma, Holloway brings the case to this court by writ of error, and has assigned the following errors :

First. The court erred in holding, after finding that the instructions as to what constituted residence within the meaning of the attachment laws of the Territory of Oklahoma, numbered eight and eleven, were erroneous, that it was harmless error by reason of the fact that there was an allegation of fraudulent disposition of property in the affidavit of attachment, and that this was sufficient to support the judgment of the court.

Second. The court erred in holding that it was not an abuse of judicial discretion for the court below to submit special findings to the jury with reference to fraudulent disposition

of property, there being no evidence of such fraudulent disposition of property offered on the trial of the case below, and none contained in the record.

Third. The court erred in holding and affirming the judgment of the court below after finding that the following instruction, numbered 12, to wit: "You need not be unanimous in determining what your verdict shall be; nine of you can determine upon a verdict," was not reversible error, for the reason that it did not appear from the record that only nine of the jurors found a verdict, and the court was given no opportunity by motion for a new trial to correct this ruling, and that therefore it was harmless error.

Fourth. The court erred in affirming the opinion of the lower court giving judgment for more than asked for in the complaint of defendants in error. (Rec., pp. 1–2.)

ARGUMENT.

The territorial Supreme Court held that the district court erred in its instructions to the jury upon the question of non-residence: that it erred in admitting the depositions of Dunham, Dutcher, Walker and Davis; and that it erred in the 12th instruction which is as follows: "You need not be unanimous in determining what your verdict shall be. Nine of you can determine upon a verdict."

The first two said errors, the court held harmless, and the last it held that "no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors."

I.

We think it clear that the trial court did err in its instructions to the jury upon the question of non-residence. The proof is clear and undisputed that Holloway had transferred his entire mercantile business to Oklahoma from Texas, carrying with him all his merchandise; that he had not only made the move openly, but had given actual notice thereof to Dunham, Buckley & Co., who had written him approving the

move. Holloway was actually residing at Oklahoma, and engaged in carrying on his mercantile business in the usual and ordinary way. He had put himself on a footing with other residents and merchants of Oklahoma, and he had the right to demand and receive like immunities. He was there in person, and had his property there, subject to the demands of creditors, just as other merchants of Oklahoma. He was served personally with the summons to answer the ordinary suit, and also with the writ of attachment.

That Holloway had acquired a residence in Oklahoma is unquestioned, and it does not matter whether he intended it to be permanent or not, for in order to make him in law a resident of Oklahoma, in contemplation of the attachment statute, it was not necessary that he should have abandoned the *animus revertendi* to his former residence. (*McKierman* v. *Massingill*, 6 S. & M. (Miss.), 375; *Alston* v. *Newcomer*, 42 Miss., 186, 192; *Morgan* v. *Nunes*, 54 Miss., 308.)

He might have retained a domicile at Ft. Worth, Texas, and his family might have continued to occupy his domicile there, but that would not have prevented his becoming a resident of Oklahoma. (*Wells* v. *People*, 44 Ill., 40; *Nailor* v. *French*, 4 Yeates, 241; *Farrow* v. *Barker*, 3 B. Mon., 217; *Thompson's Case*, 1 Wend., 43; *Lyle* v. *Foreman*, 1 Dallas, 480; *Reed* v. *Ketch*, 1 Philadelphia, 105; *Haggart* v. *Morgan*, 1 Selden, 422; *Briggs* v. *Rochester*, 16 Gray, 237.)

While Bradley testified that Holloway stated that he expected at some time to return to Texas, yet Holloway denied that he made such statements, and in this he is corroborated by many circumstances and facts fully proven by other witnesses.

The eighth instruction declared to the jury that "though you may believe from the evidence that the defendant came from the State of Texas, and *located* in Oklahoma City in, or about September, 1891, and here engaged in business in the selling of goods, wares and merchandise, yet this of itself does not constitute him a resident of the Territory of Oklahoma To constitute him a resident of Oklahoma Territory he must,

in addition to having *moved here and engaged in business*, have determined to made this, Oklahoma Territory, his permanent residence, and if you believe from the evidence that he left his family at Ft. Worth, in the State of Texas, and that Ft. Worth was the home of himself and family at the time he left there, and that he did not, at the time of his leaving there, nor at the time of the issuing of the writ of attachment herein, intend to make Oklahoma Territory the place of his permanent residence, *or if he was undetermined as to whether or not he would make* Oklahoma Territory the place of his permanent residence * * * then in that event he was a non-resident," etc. Boiled down, that simply means that if Holloway was not then determined to reside the remainder of his life in Oklahoma, he was not a resident there at all.

Assuming that the 8th and 11th instructions of the trial court on the question of non-residence, were erroneous, to what extent may they have reasonably influenced the mind of the jury so as to affect their verdict on the charge of fraudulent disposition of his property by the defendant?

He was merchandising at Ft. Worth, Texas, when he is alleged to have incurred the debt for which he was attached; he had taken his stock of goods out of the State, and removed them to Oklahoma Territory, where he was selling them, but in the ordinary course of trade. Is it not reasonable to suppose that when under the instructions of the court, the jury found as a fact that the defendant was liable to attachment as a non-resident, that they should couple with the charge of his fraudulently disposing of his goods, the fact that he, a resident of Texas, had brought his goods to Oklahoma, and that they should conclude that the bringing of his stock of goods from Texas to Oklahoma, was but a component part of a fraudulent scheme to sell and dispose of his property, with the intent to cheat and hinder and delay his creditors?

The jury had before them the undisputed fact that the defendant had only very recently brought his entire stock of goods from Texas to Oklahoma, and under the erroneous instructions of the court, they found as a fact that he had not

become a resident of Oklahoma, but remained in law a resident of Texas, they could, therefore, reasoning from those facts, doubtless very easily reach the conclusion that the removing his goods from Texas to Oklahoma was for the purpose of perpetrating a fraud on his creditors. It is human nature for men, when convinced of the truth of one charge laid against another, to more readily accept the truth of a second charge. Such must have been the fact in this case, for when we examine the record, we find there is absolutely no evidence sufficient to establish the charge of fraud against the defendant. He had notified the plaintiffs of his move to Oklahoma, and they had approved it, by writing him under date of September 25, 1891, about one month prior to the institution of the suit, that they had "no doubt that it was a good move." (Rec., p. 87). He had left Ft. Worth because there had been a number of large stocks of goods of merchants who had failed thrown on the market at reduced prices, such that he could not compete with. He frankly informed Bradley, the representative of Dunham, Buckley & Co., that he "hadn't any money" (Rec., p. 33), and that at that time the only thing he had which was immediately available for payment of debts, was some lands in Indiana and Kansas, and that he would give these in payment or settlement of the account. He declined to give a mortgage on the lands, but said "he would give the lands for the debt" (Rec., p. 33); and at another time Holloway told Bradley that he "could take the lands or else must wait until he could pay the debt. (Rec., p. 34.)

Holloway testified that all the goods sold by him were sold in the legitimate course of trade (Rec., p. 86), and this is not disputed. There is no testimony at all even tending to show that he was disposing of his goods or any other property, otherwise than in the usual way of trade.

There is not a single iota of testimony in the record even tending to prove that Holloway was "about to sell, convey or otherwise dispose of his property subject to execution with the fraudulent intent to cheat, hinder and delay his creditors," and hence we conclude that the jury must have been influenced in the finding of their verdict on the charge of

fraudulent disposition by the defendant of his property, by their belief from the evidence under the erroneous instructions of the court, that the defendant was not a resident of Oklahoma.

Not only was the jury misled by the erroneous instructions of the court upon the question of non-residence, but their minds were no doubt confused by the immense volume of depositions and exhibits, covering in the record 37 pages (Rec., pp. 37-74), all of which were erroneously admitted by the trial court.

Chief Justice Marshall, speaking for this court in *Etting* v. *The Bank of the U. S.*, 11 Wheat, 59, said, "If the Judge proceeds to state the law, and states it erroneously, *his* opinion ought to be reviewed, and if it can have had *any* influence on the jury, their verdict ought to be set aside."

An instruction to a jury based upon a theory unsupported by evidence, and which *may have* misled the jury to the injury of a party litigant, is sufficient to justify a setting aside of their verdict. (*Davis* v. *Patrick*, 122 U. S., 133.) In *Thacher* v. *Jones*, 31 Me., 528, it is said, "It should appear to be morally certain that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial." In *Davis* v. *Davis*, 1 Pick., 206, C. J. Parker, speaking for the court said: "The court are all satisfied there must be a new trial, on account of the opinion expressed by the judge to the jury, that the guardian might be cited in the probate court to settle a new account, notwithstanding the proceedings which had taken place with respect to the decree in question. That opinion was certainly calculated to have an effect upon the minds of the jury and to render them more willing to return a verdict against the plaintiff than they otherwise might be." So in the case at bar, when the jury were able to say under the erroneous instructions of the trial court that which they could not have said under correct instructions, namely, that the defendant was a non-resident, it "was certainly calculated to have an effect upon the minds of the jury, and to render them more willing to return a verdict against the defendant "than they otherwise might" have been.

In *Wardell* v. *Hughes*, 3 Wend., it is said: "Inasmuch as the verdict *may have* resulted from the error of the judge * * * a new trial ought to be granted."

In *Gillespie* v. *Gillespie*, 2 Bibb., 98, it is said: "If the court give erroneous instructions to the jury, and the verdict corresponds with the instructions, the verdict must be set aside, notwithstanding the evidence would have warranted the finding; for the jury *might have found differently* but for the improper instructions of the court."

This court said in *Beaver* v. *Taylor*, 1. Wall., 637: "The law as to instructions outside of the facts of the case, or involving abstract propositions, is well settled. If they *may* have misled the jury to the injury of the party against whom their verdict is given the error is fatal," citing *Clarke* v. *Dutcher*, 9 Cow., 674.

II.

The 11th error assigned in the Territorial Supreme Court (Rec., p. 98), and the third error assigned in this court (Rec. p. 2) are to the giving of the 10th instruction by the trial court, which is as follows:

10th. If you believe from the evidence that the defendant was selling and disposing of his goods and property and was not appropriating the proceeds of the sales to the payment of his debts and was refusing to pay his debts or secure them, then these are facts and circumstances which you may take into consideration, determining whether or not he was disposing of his property with a fraudulent intent—to cheat, hinder, or delay his creditors; and if you find from the evidence he was so doing, you will find for the plaintiff on the ISSUE in attachment.

As stated above, there was no evidence before the jury, that the defendant "was not appropriating the proceeds of the sales (of his goods and property) to the payment of his debts, or that he "was refusing to pay his debts;" not one fact was introduced in evidence that tended in the slightest degree to prove that Holloway was selling or disposing of any property with intent to defraud his creditors.

The court, by the 10th instruction, told the jury that if they

found that the defendant "was disposing of his property with a fraudulent intent," "you will find for the plaintiffs on the issue in attachment." The ***attachment issue*** was formed on the affidavit for attachment, which included the two grounds, non-residence and fraudulent disposition of property, and the traverse; when, therefore, the court instructed the jury that if they found that the defendant "was disposing of his property with a fraudulent intent" they "will find for the plaintiffs on the *issue* in attachment," the jury were in effect instructed that if they believed from the evidence that one ground of the attachment had been made out, that they should find both grounds established.

The court had in the 3rd instruction informed the jury that they were trying two issues:

"1st. Whether or not the attachment herein shall be sustained."

"2nd. The matter of indebtedness."

To say the least of it, the 10th instruction was confusing and calculated to mislead the jury, especially in view of the fact that there was no sufficient evidence before them to justify the giving of the instruction.

III.

The 3rd error assigned in this court is to the 12th instruction to the jury, which is as follows:

"You need not be unanimous in determining what your verdict will be; nine of you can determine upon a verdict."

The court also instructed the jury as follows, how their verdict should be signed: "Your foreman will sign each of the verdicts, and also this special verdict when you are agreed." (Rec., p. 98).

The statute of Oklahoma (1890) then in force, provided that "The number of jurors in a civil action shall not exceed twelve nor be less than three. The parties may determine the number of jurors by agreement, and in case of their disagreement the number shall be twelve." (Sec. 6, Art. 18, Chap., 70, p. 840.)

"When the jury have agreed upon their verdict, it must be reduced to writing and signed by the foreman. If four jurors dissent from the verdict, they shall again be sent out to deliberate." (Sec. 25, p. 843.)

It will be observed that the statute required that the verdict should be signed by the foreman, whether unanimous or only nine agreed to it. No mode was provided by the statute or the instructions of the court for the return of a verdict when only nine agreed to it, different from that when all twelve agreed. In this respect, the statute is different from that of the Territory of Utah, passed on by this court in *American Publishing Co.* v. *Fisher*, 166 U. S., 464, and *Springville* v. *Thomas*, ib., 707, where a somewhat similar territorial statute was declared unconstitutional and void. The Utah statute, as also the instruction of the court to the juries in said cases, required that the jurors who agreed to the verdict should sign it, by which means the court and counsel were advised whether the verdict was unanimous or not. But the Oklahoma statute, and the instruction of the court in this case, required that the verdict should be signed by the foreman only.

The statute upon which the instruction was based, was violative of the constitution as declared by this court in the several cases in 166 U. S., *supra*, but the Territorial Supreme Court, said "no exception was properly taken to it at the time it was given and the record fails to show that the jury was polled, or that the verdict was returned by a less number than twelve jurors." (Rec., p. 109.)

The Territorial Supreme Court considered and held sufficient other exceptions taken at the same time and in the same manner that the exception to this instruction was taken. The court certifies in the bill of exceptions that "to the giving of which instructions and each of them the defendant at the time excepted." (Rec., p. 26.)

The Territorial Supreme Court in its opinion says: "It is insisted by appellee that under the code, 1890, the appellant has not properly saved *his objections to the instructions*." (Rec., p. 107.) Then proceeding to discuss the question as to

whether the exceptions "to the instructions" had been by the defendant properly saved, it reaches a conclusion that the exceptions had been sufficiently saved (Rec., p. 108), and in this we think the court did not err. The statute (1890) provided:

4565, § 19. "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions, but it shall be sufficient to write on the margin, or at the close of such instruction, "refused and excepted to," or "given and excepted to," which memorandum shall be signed by the judge and dated."

That statute was substantially complied with. The whole record of this case went up to the Oklahoma Supreme Court on appeal; everything was certified up, all the pleadings, all the testimony, all the rulings of the court, all the instructions given, as also those refused, the final judgment, and the whole is now before this court.

An attachment at law is wholly statutory and in derogation of the common law, and its provisions, therefore, guarded and restricted to the precise letter of the statute. The proceeding is considered as a violent and extraordinary special remedy, and the plaintiff has universally been held to a strict compliance with all the provisions of the statute. The court has no jurisdiction under its general powers, and the power of the court to act must appear on the face of the proceedings.

The record shows that the defendant requested a jury, and neccessarily that meant a jury of 12 men, and had a right, under the Constitution of the United States, to demand that the verdict should be the unanimous verdict of the entire 12. When the court instructed the jury that they need not be unanimous in their verdict, but that nine could determine the verdict, it was proceeding not in accordance with "the law of the land." When the cause was turned over to the jury to determine the facts under the instructions of the court as to the law, then it was that the jury had exclusive jurisdiction of the case, but without any authority to act except unanimously. And yet the jury was instructed that nine of them could agree upon a verdict, and that the verdict need only be signed by the foreman. This was not "due process of law."

The Constitution of the United States secures to the citizen of the territories immunities against the deprivation of his property except by "due process of law."

It is said, "due process of law means, in each particular case, such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safe-guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." It was said in *Ziebold's Case*, 19 Reporter, U. S. Cir., 472, that "due process of law" and "law of the land," have a broad and comprehensive meaning, and originated in that great bill of rights, Magna Charter, and operate as a restriction on each branch of civil government." "Due process of law" in judicial proceedings implies jurisdiction and trial; it means a course of legal procedure according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter."

In this case, the questions of fact were to be passed upon by the jury, and if the jury was not constitutionally organized, or if there were conferred upon it either greater powers than the constition allowed, or it was limited in the exercise of its constitutional powers, in either event the finding of the jury was not in accordance with the "law of the land." The highest rights of an American citizen are those conferred by the constitution, and whenever those rights are infringed upon, the courts of the country are not disposed to indulge in too great strictness as to the manner of bringing the questions before them, but, as we understand the disposition of this court, it is to come promptly to the protection of the citizen, whenever he has been deprived of any of his constitutional rights and privileges. In this case, nine of the jurors might have agreed to the general verdict, and nine might have responded affirmatively to the first question, which might have included only six of the nine who agreed to the general verdict; and then nine might have responded to the second question, and that nine might not have included all

that responded affirmatively either to the general verdict or to the first question, and hence, since under the instructions of the court, in accordance with the statute, the verdicts were only to be signed by the foreman, it is impossible to tell how many or which ones of the jury agreed to either of said verdicts.

A verdict is "the unanimous decision made by a jury and reported to the court, on matters lawfully submitted to them in the course of the trial of a cause. (Bouvier Law Dictionary.)

It cannot be said that the cause is lawfully submitted to the jury when it is submitted to them in such a way that nine of their number may determine a verdict. In the case of *Biggs* v. *Barry*, 2 Curt., 259, the jury found generally for the plaintiff, but upon being questioned, it appeared that some considered the plaintiff entitled to recover on one ground, and some on another; for this reason the verdict was set aside. The record should always make it affirmatively appear that there was a jury of twelve men, and that the verdict returned into court was the unanimous finding of the jury. These are jurisdictional matters, and jurisdiction must always affirmatively appear. It never devolves upon the defendant to show that the court did not have jurisdiction, but it devolves upon the plaintiff to show that the court had full jurisdiction and that the cause was determined in accordance with the law of the land, and when it does not so appear any judgment rendered is *coram non judice*.

IV.

Among other errors assigned in the Territorial Supreme Court were the following:

19th. The complaint and exhibits thereto attached and the evidence in the case show that the contract and purchase of the goods, wares, and merchandise was in the State of the New York, and governed by the laws of the State of New York, under which laws only six per cent interest can be allowed and collected, and the court erred in allowing interest on said account at the rate of seven per cent per annum.

20th. The court erred in rendering judgment for more than the amount claimed in the complaint and interest thereon and more than the evidence and accounts filed as exhibits show to be due.

21st. Said judgment is not sustained by the proof, nor authorized by the complaint nor evidence in the case, and is erroneous.

22d. The court erred in allowing any interest on said account, as no demand of payment was shown, and until such demand no interest under the laws of New York accrued. (Rec., p. 93.)

The above are comprehended in the fourth error assigned in this court, which is:

"The court erred in affirming the opinion of the lower court giving judgment for more than asked for in the complaint of defendants in error. (Rec., p. 2.)

The judgment asked in the petition, was for $5,004.58, "with interest thereon, according as the same may *appear to be due from the items of said exhibit*, at the rate of seven per cent per annum." (Rec., p. 5.)

It will be remembered that the only competent or legal testimony introduced that tended to prove the account sued on was the deposition of Bradley, and that was most meager. The contracts sued on were made in New York; there is no proof whatever upon the question of interest, whether there was a contract to pay interest or whether it was customary to charge interest, or if any interest was to be charged, what the rate should be. The subject of the interest does not seem to have been referred to at the trial, until the court instructed the jury as follows:

9th. If you believe from the evidence at the time of the institution of this suit the defendant was and is now indebted to the plaintiffs for goods, wares, and merchandise purchased of plaintiffs by defendant, as charged in the complaint, then you will find for the plaintiffs in such sum as the evidence shows to be due them, with interest thereon, at the rate of seven per cent per annum, from March 23rd, 1891, to the present. (Rec., p. 98.)

The first *item* in the account sued on shows that it was due 60 days after December 31, 1890, and that the last item was

due 4 months from May 6, 1891, and yet the court instructed the jury that they should charge interest on *all* the items from March 23, 1891. There are 19 *items* charged in the account sued on, that did not become due until from the 20th of April, 1891, to the 6th of September, 1891. See account Rec., p. 6.

There was no testimony whatever as to when the account did become due, but it shows upon its face, that a very large portion of it was not due March 23, 1891. Without any testimony whatever, the trial court arbitrarily fixed the rate of interest, and the time from which interest should be charged.

The instruction of the court as to the time from which interest should be charged, was in conflict with the demand for judgment made in plaintiff's petition, in this, that they asked "interest according as the same may appear to be due *from the items* of said exhibit," that would have given them interest on the last item of $393.52, from September 6, 1891, whereas the court allowed interest on the whole account from March 23, 1891. The last item in the account was due four months from May 6, 1891. There is no question but the verdict of the jury was for an amount greater than was legally due plaintiffs, even allowing interest at 7 per cent.

At common law interest was not allowed in any case.

Interest can only be allowed upon a contract, expressed or implied, and as authorized by statute, Viner's Abridgment, title Interest. Chitty on Contracts. *Ill. Cent. R. R.* v. *Cobb*, 83 Am. Rpt., 244; *Clay Co.* v. *Chickasaw Co.*, 64 Miss., 534.

A contract to pay interest must, of course, be proven as any other contract.

Chadbourne *v.* Hanscom, 56 Me., 554.
Knox *v.* Jones, 1 Dallas, 193.

In general, interest is not allowed upon unliquidated accounts, in the absence of an agreement, express or implied, to pay it. *Curtis* v. *Innerarity*, 6 How., 146; *Swett* v. *Hooper*, 52 Me. 54; *Chicago* v. *Tibbetts*, 104 U. S., 120. Upon liquidated accounts interest is allowed only after the correctness of the account has been acknowledged, or demand made. *Newell* v. *Griswold*, 6 Johns., 45.

There is no proof that Holloway ever admitted the correctness of the account until October 26, 1891, if indeed he admitted it then.

The rate of interest is according to the law of the place of the contract, unless stipulated differently in the contract. Here the contract was in New York, and the rate is by statute of that State fixed at 6 per cent.

But the Territorial Supreme Court said: "Six per cent, may be the rate of interest in the State of New York, but if so, counsel should have plead the statute. In the absence of such pleading and proof, we will assume that the rate of interest in the State of New York is the same as in Oklahoma." The defendant had plead the general issue; he had denied in due form of law every material allegation in the petition of plaintiffs, and we are at a loss to understand why any other pleading was necessary. The defendant was not defending against a usurious contract, but he denied the contract as a whole—he denied that he ever undertook or promised to pay 7 per cent. interest. The state of the pleadings were such when the case went to trial, that the burden was on the plaintiffs to establish by competent proof every material allegation in their petition, among which was the charge for interest, at the rate of 7 per cent.

When the place of payment is not expressed in the contract, the law will presume that it was to be paid at the place where it was made, and the law of that place will govern. *Lynes* v. *Mack*, 19 Ind., 223; *Chase* v. *Dow*, 47 N. H., 405.

In the absence of all proof whatever upon the question of interest, either as to the rate or from what time it should have been charged, no interest should have been allowed, and the giving of the 9th instruction of the trial court was error, and the verdict of the jury was in excess of what under any circumstances should have been allowed.

V.

CONCLUSION.

In conclusion we respectfully submit that a judgment in attachment should not be permitted to stand, when it rests on

a record so full of errors, and so exceedingly barren of proof.

The amount of the judgment is clearly excessive; the grounds of the attachment are not sustained by sufficient proof, and there is nothing in the record to show that the verdicts of the jury were concurred in by all the jurors.

That the defendant was not in a condition at the time he was attached and his business closed up to pay all his debts right then is not denied, but may be admitted without shame or humiliation, and within itself was no ground for attachment. He, like thousands of others, had been overtaken by the stress of hard times, and was confronted by exacting creditors. He was engaged in one of those great struggles that so ofteu come to the country merchant. Business was dull and sales were difficult, but no where in the record is there a single particle of testimony that tends in the slightest degree to indicate that he had been guilty of the smallest act not compatible with the highest integrity. He had promptly notified plaintiffs of his move to Oklahoma, and when their representative, Mr. Bradley, went there, the defendant took him through his store, showed him his stock, and fully and truthfully explained his condition. He informed Mr. Bradley of his lands that he owned in Kansas, and Indiand, told him where they were located, and their condition, and offered to give them in payment of his debt. Of course, he could not afford to destroy his stock by selling plaintiffs a large part thereof; that would have ruined his business, and rendered comparatively valueless the remaining portion, but he was ready and willing to let them take his lands. As we see and understand the record, a more unjustifiable legal proceeding was scarcely ever instituted against a man, than was the attachment in this case. Nor is it often that a record of a trial of the importance of this, is seen, in which so little regard was paid to the ordinary principles and rules of legal procedure.

Respectfully submitted,

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No. 247.

FILED.
MAY 2 1898
JAMES H. McKENNEY,
CLERK

Brief of Dudley & Michener for D. C.

SUPREME COURT

Filed May 2 1898.

UNITED STATES.

October Term, 1897.

No. 247.

JOHN R. HOLLOWAY, Plaintiff in Error
vs
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB and WILLIAM E. WEBB.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

Brief on Behalf of James H. Dunham, William T. Buckley, Charles Webb and William E. Webb,

Defendants in Error.

M. M. DUDLEY & MICHENER, WASHINGTON, D. C.,
AND
SELWYN DOUGLAS AND MACGREGOR DOUGLAS,
OKLAHOMA CITY, OKLA.
ATTORNEYS FOR DEFENDANTS IN ERROR.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1897.

No. 247.

JOHN R. HOLLOWAY, Plaintiff in Error
vs
JAMES H. DUNHAM, WILLIAM T. BUCKLEY, CHARLES WEBB and WILLIAM E. WEBB.

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STATEMENT.

This case come to the Supreme Court of the United States by writ of error from the Supreme Court of the Territory of Oklahoma.

The transcript of the Record in this case, as sent up by the Clerk of the Supreme Court of the Territory of Oklahoma, is illy arranged and is not in chronological order, which is probably the fault of Counsel for Holloway in the preparation of the original bill of exceptions in the District Court of the Third Judicial District of the Territory; but it shows:

That, on the 31st day of October, 1891, the defendants-in-error in this court, as plantiffs in the territorial District Court, filed their complant in the District Court of the Third Judicial District of the Territory of Oklahoma sitting within and for the County of Oklahoma, praying for judgment against Holloway, defendant in said District Court, on an account, in the sum of $5,004.58, with interest, as set forth in the complaint, accompanied by affidavit and undertaking in attachment.

Transcript of Record, pages 5 to 9.

On the 28th day of November, 1891, J. R. Holloway, defendant in lower court, plaintiff-in-error here, filed his answer,—a general denial,—to said complaint.

Transcript of Record, pages 9 and 10.

Afterwards, on November 7th, 1891, Holloway filed two more general denials to the complaint, the reason for which additional answers does not appear.

Transcript of Record, page 13.

And afterwards, on November 23rd, 1891, Holloway filed a fourth answer to complaint, it also being a general denial.

Transcript of Record, page 14.

On November 14th, 1891, Holloway filed a notice of a motion to discharge the attachment in said cause, but we do not find that any such motion was filed on that day or at any other time, unless it is claimed that the answer of Holloway to the attachment proceedings is or was intended for such motion,—which answer was filed on November 23rd, 1891.

Transcript of Record, pages 14 and 15.

On November 25th, 1891, a fifth answer on behalf of Holloway to the complaint was filed, signed and verified by W. S. Holloway, as agent for defendant; and, on the same day, the plaintiffs, Dunham et al., filed a motion to strike from the files this last answer, but the record does not show that the Court passed upon such motion.

Transcript of Record, pages 16 and 17.

On January 16th, 1892, the attorney of Dunham; et al., plaintiffs in the lower court, served notice in writing upon Holloway that the deposition of J. H. Bradley, as a witness for Dunham et al., in said cause would be taken as per notice, on the 26th day of January, 1892.

Transcript of Record, page 30.

The deposition of said Bradley was accordingly taken pursuant to the notice, and filed in said cause in the said District Court on January 30th, 1892, thereafter, with certificate thereto of S. A. Emanuel, Notary Public.

Transcript of Record, pages 31 to 36.

The depositions of James H. Dunham and others were also taken on behalf of plaintiffs below, upon notice duly given to Holloway, and were filed in said cause, with a certificate of the notary, in February, 1892.

Transcript of Record, pages 34 to 36, inclusive.

On June 13th, 1892, said District Court overruled Holloway's motions to suppress depositions for plaintiff, but the journal entry on page 17 of the record, overruling same does not apply to deposition of J. H. Bradley, nor is there any order of the Court or other entry to that effect set forth in the transcript.

Transcript of Record, page 17.

A jury was empaneled, and the issues both upon the question of indebtedness and upon the attachment were submitted to the jury, and upon June 15th, 1892, the Court gave its instructions to the jury, and submitted to the jury two special questions, to be answered specially, yes, or, no, by the jury; and to the giving of the instructions, Holloway, by his counsel, excepted generally.

The instructions of the Court, together with the special questions submitted to the jury, with the answers of the jury thereto appended, appear in the transcript.

Transcript of Record, pages 24, 25, 26.

Certain instructions were also requested by defendant Holloway, and refused by the Court, to which refusal Holloway generally excepted.

Transcript of Record, pages 26, 27.

Thereafter, on June 16th, 1892, the jury returned into Court their verdict upon the attachment issues, and also separately upon the question of the alleged indebtedness of the defendant, Holloway, to the plaintiffs upon both issues. And the jury also returned their answers and special findings to the two questions submitted by the Court.

Transcript of Record, pages 11, 12.

Thereafter, on the same day, the defendant filed his motion for a new trial, which was overruled by the Court, to which ruling defendant Holloway excepted.

Transcript of Record, pages 27. 28.

Thereafter, on the same day, the Court rendered its judgment upon the verdict of the jury in favor of the plaintiffs, Dunham et al., and against said defendant, Holloway.

Transcript of Record, pages 11, 12.

Thereafter, the defendant, Holloway, tendered his bill of exceptions, and the same was presented to the trial Judge on June 25th, 1892, and Holloway thereupon took the case upon said bill of exceptions, to the Supreme Court of the Territory of Oklahoma.

Transcript of Record, page 102.

A brief statement of the case by Hon. Frank Dale, Chief Justice of the Supreme Court of Oklahoma, is set forth on pages 102 and 103 of the printed Transcript of Record, as the same appears on file in the Supreme Court of the United States.

The assignments of error filed by Holloway in his motion for new trial are also briefly and correctly summarized in said statement.

Transcript of Record, pages 102, 103.

This statement of the case and summary of assignments of error, made by Chief Justice Dale, is followed by the first opinion of the Oklahoma Supreme Court, in said cause, in which said first opinion said Court found against Dunham et al., on the mistaken assumption that no proof of the indebtedness of Holloway had been made in the Court below, outside of the depositions of James H. Dunham, John T. Dutcher, Henry W. Walker and Edwin A. Davis, suppressed by the territorial Supreme Court.

See Transcript of Record; first opinion of the Oklahoma Supreme Court; pages 104, 105,—last paragraph of opinion.

The territorial Supreme Court was mistaken in this, its first opinion, as to the proof of indebtedness. The deposition of J. H. Bradley, a witness for Dunham, et al., *which deposition was not suppressed,* clearly and distinctly proves the indebtedness of Holloway to Dunham et al., and, upon motion for rehearing by Dunham et al., filed in the territorial Supreme Court, said Court reviewed the evidence, set aside its first opinion, and affirmed the decision of the lower Court in favor of Dunham, et al.

See depositions and testimony of J. H. Bradley, in Transcript of Record, pages 31 to 35 inclusive, and particularly the last two or three paragraphs of said testimony.

See also first paragraph of final opinion of the territorial Supreme Court, on rehearing,—Transcript of Record, page 117.

The final decision of the territorial Supreme Court in favor of Dunham et al., and setting aside its first decision, was rendered on July 27th, 1895.

Transcript of Record, pages 106 to 110 inclusive, and page 117.

Thereafter, Holloway, by writ of error, brings the case into the Supreme Court of the United States for review.

The assignments of error are set forth and stated at length in Holloway's motion for new trial, as shown on Transcript of Record at pages 27 and 28, and are as follows:

1. The Court erred in refusing to grant the defendant an early hearing on his motion to discharge the attachment.
2. The Court erred in ordering a trial of the question of the validity of the attachment to a jury.
3. The Court erred in requiring a trial as to the validity of the attachment in conjunction with the trial as to the merits on the complaint.
4. The Court erred in overruling the defendant's motion to suppress the deposition of J. H. Bradley.

5. The Court erred in overruling defendant's motion to suppress the deposition of James H. Dunham, J. T. Dutcher, Wm. H. Walker and Edwin A. Davis.

6. The Court erred in allowing the exhibits attached to the deposition of James H. Dunham, J. T. Dutcher, W. H. Walker and Edwin A. Davis to be read in evidence.

7. The Court erred in refusing to allow the cross-interrogatories 2, 3, and 4 of the depositition of A. B. Smith to be read in evidence.

8. The Court erred in refusing to allow the crosss-interrogatory of the deposition of James Riley to be read in evidence.

9. The Court erred in refusing to allow the witness, O. A. Kincaid, and Mrs. White to testify as to what defendant said to them in his efforts to procure a home for his family and their replies thereto.

10. The Court erred in refusing all of the instructions asked for by the defendant.

11. The Court erred in refusing instructions 3 and 4 asked for by defendant.

12. The Court erred in giving instructions numbered 6, 8, 9, 10 and 1.

13. The assessment of the amount of recovery is erroneous, being too large.

14. The verdict of the jury on the attachment issue is not supported by sufficient evidence.

15. The verdict of the jury on the attachment issue in contrary to law.

16. The verdict of the jury on the amount of recovery is not sustained by the evidence and is contrary to law.

17. The special findings of the jury numbered 1 and 2 are not sustained by the evidence and are contrary to law.

BRIEF AND ARGUMENT.

The first, second and third assignments of error may properly be considered together, and, at the outset, we desire to call the attention of the Court to the fact that plaintiff-in-error, Holloway, failed to file any motion in the lower court to discharge the attachment, and the record fails to disclose or set forth any such motion, unless Holloway's answer in attachment proceedings, found on page 15 of the printed transcript, can be termed such a motion, which is hardly possible; nor does the record show that any such motion was heard or acted upon, nor does the transcript show that any order or ruling of the court on any such motion was made.

But, suppose such a motion had been made and overruled by the Court, such order of the Court would have been the proper one.

The law under which the attachment was sued out was adopted from the Indiana Code, and the courts, in construing that statute, uniformly hold that proceedings in attachment are merely auxiliary to the main action, and that both the principal and the attachment proceedings must be tried together.

Work's Indiana Practice, 2nd Ed., Vol. 2, Sec. 1328.
Waples on Attachment, pages 426, 427.
Foster vs. Dreyfus, 16 Ind. 158.
Bradley vs. Bank, 20 Ind. 528.
Fork Co. vs. Lukrus, 38 Ind. 438.

Therefore, the cause having been submitted to the jury, both the isssue upon the indebtedness and the attachment issues were properly submitted to the jury.

The fourth assignment of error is that the Court erred in overruling the motion to suppress the deposition of J. H. Bradley.

We submit that the Court, in overruling such motion, did not err.

The notice given to plaintiff-in-error is set forth in full on page 30 of the printed Transcript of Record, together with the acknowledgment of service thereof and receipt of copy of the notice by plaintiff-in-error and his attorneys.

Transcript of Record, page 30.

In that notice, the title of the court and venue were properly given, the style of the cause was correctly stated, the time and place for taking the depositions were accurately and distinctly named, the name of the notary and the name of the witness were both set out in the notice. The notice could not have been made more complete. It was dated, and the acknowledgment of service thereof by Holloway and his attorneys shows the same date as the notice, and that ample time was given all parties to attend at the taking of the deposition.

Transcript of Record page 30.

The first principal objection urged to this deposition of J. H. Bradley is that it was taken in violation of the provisions of sections 4456,4465 and 4486, of the Oklahoma Statutes (1890). But the provisions of section 4456 are fully complied with, as above shown, because that section simply declares what the notice shall contain, to-wit:

"First.—The cause or matter in which the deposition is to be used.

"Second.—The court or tribunal in which the trial is to be had.

"Third.—The time and place of taking the deposition, and the names of the witnesses."

Oklahoma Statutes of 1890, Sec. 4456.

Section 4465 of the same statute was also complied with in the taking of Bradley's deposition.

The section is as follows:

"Sec. 4465.—The deponent shall first be sworn by the officer to testify to the truth, the whole truth and nothing but the truth, relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and *by the officer* or parties afterward, if they see cause."

The provisions of the above section were fully complied with. The deponent was properly sworn, the examination was held at the time and place and before the notary named in the notice, neither party was present or represented by attorney at the taking of the deposition, and all the questions were asked by the notary, as may properly be done under the provisions of section 4465.

Transcript of Record, page 35.

As to section 4486, we submit that its provisions do not apply in the matter of taking this deposition, and if they did, there is nothing to show that they have been violated.

The second principal objection to the deposition of Bradley is that:—The officer's certificate does not show that the deposition was read over to the witness before he signed the same."

This is puerile. The statute which provides what the notary's certificate shall contain is particularly concise and clear. It is contained in Section 4467 of the Oklahoma Statutes of 1890. and is as follows:

"Sec. 4467.—The officer shall annex a certificate to the deposition, stating the following facts:

"First.—That the deponent was sworn according to law.

"Second.—By whom the deposition was written, and if written by the deponent or some disinterested person, that it was written in the presence and under the direction of the officer.

"Third.—Whether or not the adverse part attended.

"Fourth.—The time and place of taking the deposition. and the hours between which the same was taken, and the officer shall sign and attest the certificate and seal the same, if he have a seal of office."

Oklahoma Statutes (1890), Sec. 4467.

The certificate of the notary fully satisfies every requirement of the statute. The clear presumption is that the deposition was read to the witness before he signed it. The statute does not require that the certificate should show that fact, and the Court will presume that what should have been done was done.

Oklahoma Statutes (1890), Sec. 4467.

Another objection is that: "It appears from the record that written interrogatories were placed in the hands of the officer who took the depositions and that neither defendant nor his attorneys were notified of this fact, etc."

Transcript of Record, page 22.

In reply to this, it is only necessary to say that the Record shows nothing of the sort. If it had been actually done, it would not have been improper.

Work's Indiana Practice, 2nd Vol., Sec. 1241, p. 209.

Still another objection is that: "The officer had no right to propound interrogatories, except as given in section 4465; and then only after the witness is examined by the party producing him, also after examination by the adverse party."

In reply to this objection we submit that:

"No deposition shall be suppressed for any informality therein, or in the taking thereof, unless such informality shall be prejudicial to the substantial rights of the party."

Work's Indiana Practice, 2nd Vol., Sec. 1241.
Oklahoma Statutes (1890), page 826, Sec. 4475.

The last objection in Holloway's motion to suppress Bradley's deposition is that: "The 5th interrogatory and all others were written by plaintiff's attorneys and secretly transmitted to the notary who took the deposition, in violation of section 4486 of the Oklahoma Statutes."

Transcript of Record, page 22.

In reply to this objection we have to say that there is nothing in the record to show the truth of the averment contained in the objection. There is nothing in the bill of exceptions, nothing in the certificate of the notary to show it. The Court will not assume it to be the fact.

The writers of this brief know nothing of the case except as the record here and in the Oklahoma Supreme Court discloses the situation.

But suppose it had been done for the guidance of the notary, it would have been proper, and no injury or injustice could have been done thereby to either party.

Work's Indiana Practice, 2nd Ed., 2nd Vol., Sec. 1241.

We therefore respectfully submit that the deposition of J, H. Bradley was properly taken and properly submitted as evidence to the jury, both on the issues of the debt and of attachment.

The fifth assignment of error in the motion for new trial filed by Holloway, is:

"That the Court erred in overruling Holloway's motion to suppress the depositions of James H. Dunham, J. T. Dutcher, William H. Walker and Edwin A. Davis."

Transcript of Record, page 27.

The Supreme Court of Oklahoma hold that these depositions of Dunham, Dutcher, Walker and Davis ought to been suppressed, and that the lower court erred in admitting them in evidence, but that the error was immaterial, as depositions referred only to the debt, and that the debt was clearly proven by the testimony of Bradley and not denied by Holloway, and that, therefore, the evidence contained in the depositions of Dunham, Dutcher, Walker and Davis was but cumulative.

In other words, under the pleading and the evidence of Bradley, coupled with Holloway's failure to deny the debt, —his more than tacit admission of the indebtedness,—the depositions of Dunham, Dutcher, Walker and Davis might well not have been offered or considered at all; and yet, upon the Bradley deposition and Holloway's admission, it would have been proper for the court to have directed the jury to

bring in a verdict for the plaintiff upon the question of the indebtedness.

The views of the Oklahoma Supreme Court upon this question are very clearly stated in the first opinion of that Court.

Transcript of Record, page 104.

Ordinarily, we should let a question of so small moment pass without further comment and agree that the view of the Oklahoma Supreme Court might be accepted, and that the depositions of Dunham, Dutcher, Walker and Davis might properly be suppressed as a matter of no importance. But the Supreme Court of Oklahoma, in its first opinion, evidently paid but slight attention to the record of the evidence in this case, because, in that opinion, that Court says: "That an examination of record discloses the fact that there is no evidence whatever showing any indebtedness on the part of Holloway to the plaintiff below, except such as appeared in the depositions of Dunham, Dutcher, Walker and Davis." As a matter of fact, clear and unmistakable proof of Holloway's indebtedness is shown in last paragraph of Bradley's deposition.

Transcript of Record, page 35.

And it was on account of that oversight by the Oklahoma Supreme Court that a rehearing was had upon the Court's having had its attention called to the matter, and the case finally decided by that Court in favor of Dunham et al.

For these reasons we feel impelled to urge that notwithstanding the view of the Oklahoma Supreme Court,—notwithstanding the fact that the question of the admission or

suppression of the Dunham, Dutcher, Walker and Davis depositions is of no importance,—as the defendants-in-error have made a clear case without them,—we wish to submit our reasons for thinking that the Dunham, Dutcher, Walker and Davis depositions were properly admitted by the lower court as evidence in the case.

The certificate of the notary, by its reference to the notice, shows when said depositions were taken. The notice served upon Holloway was that the depositions were to be taken before S. A. Emanuel, a notary public, at No. 10, Wall Street, New York City, in the State of New York.

Transcript of Record, page 36.

And the heading or caption of the depositions is as follows: "Depositions of witnesses taken before S. A. Emanuel, a notary public within and for New York County in the State of New York; in pursuance to the notice hereto attached."

Transcript of Record, page 37.

And, "Now on this 30th day of December, 1891, before me, the undersigned, S. A. Emanuel, a notary public within and for New York County, appeared J. H. Dunham," etc.

Transcript of Record, page 37.

So that the certificate with its references shows all the matters required. It shows that the taking of the depositions began December 30th, 1891, and were finished before five o'clock in the afternoon of that day. The date and seal and signature of the notary with the foregoing shows all the requirements of the statute to have been filled and met, and that Emanuel was a notary public at that time.

The failure of the notary to add to his certificate and signature the date of the expiration of his notarial commission is of no importance. In a state or territory where the law requires such addition and statement, its omission might subject the notary to prosecution for misdemeanor, but such an offense would scarcely justify the punishment of other people.

The seventh and eighth assignments of error in Holloway's motion for a new trial, complaining of the refusal of the Court to permit cross-interrogatories Nos. 1, 2 and 3 of the deposition of A. B. Smith and cross-interrogatory No. 1 deposition of James Riley to be read in evidence, may be considered together with the 9th assignment therein,—that the Court erred in refusing to allow A. O. Kincaid and Mrs. White to testify what Holloway had said to them in his efforts to procure a home for his family and what they said to Holloway in reply.

Such evidence, if admitted, would have been hearsay of the rankest kind. We do not care to discuss the proposition, especially as no exceptions were saved to the rulings of the court.

Transcript of Record, pages 82, 83, 88, 89.
Opinion of Supreme Court upon rehearing.
Transcript of Record, page 107.

The 10th, 11th and 12th assignments of error set forth in Holloway's motion for a new trial, concerning the giving and refusal to give instructions by the Court to the jury may be considered together; but for convenience, we propose to discuss, first, those given by the Court.

Transcript of Record, pages 96 to 99 inclusive,

There were two issues, as heretofore stated, submitted

to the jury,—*first*, the question of indebtedness, and, *second*, the issues in the attachment.

Upon the first of these, the Court could have properly directed the jury to find for the plaintiff and against Holloway, for the reason that the testimony of Bradley proves the indebtedness, and for the further reason that the plaintiff-in-error, Holloway (defendant in the District Court), does not deny his indebtedness to Dunham et al., but substantially admits it in his testimony.

Transcript of Record, page 86.

The transcript, at the page just cited, shows that Holloway's counsel asked him the following question:

"You did tell him (Bradley) that *you'd give lands in payment of the debt*, but you would not incumber them by a mortgage, did you?"

To this question Holloway answered: "*Yes, sir*; I'd make a deed straight to them."

Again Holloway's counsel called his attention to the testimony of Bradley in the following question:

"Mr. Bradley in his deposition also testifies that these different tracts of land to which you offered to make a deed, were all incumbered;—that was a fact was it?"

To this Holloway answered: "Yes, sir."

Counsel for Holloway then inquires:

"I will ask whether you didn't offer to clear the incumbrances of one 160?"

To this question Holloway answers: It—320; that is I told him I would pay off the incumbrance, and give a deed to him free of incumbrance."

Transcript of Record, page 86.

In view of the testimony of Bradley, which had been

previously offered in evidence, this testimony of Holloway is a substantial admission of his indebtedness, and he nowhere, in his testimony, so much as hints that the amount of the indebtedness as set forth in Bradley's deposition is not correct.

So that defendants-in-error were and are entitled to their money judgment against Holloway, and, *no matter what disposition might have been made of the attachment issues,—even had those issues been found in Holloway's favor, nevertheless, the money judgment would have had to stand in favor of defendants-in-error and against plaintiff-in-error, Holloway.*

Hence, our discussion and inquiry as to the correctness of the instructions given by the Court to the jury may be properly limited to the question of the attachment issues, and the application of the instructions to those issues.

In the affidavit for attachment filed against Holloway, in the lower court at the beginning of the action, two causes and grounds for attachment are specifically set forth,—*first*, that Holloway was *about* to dispose of his property, with the fraudulent intent to cheat, hinder and delay his creditors, —*second*, that Holloway is (was) a non-resident of the Territory of Oklahoma.

These were the only controverted questions in the case. Both were, as already noted, specifically and separately submitted to the jury, and the jury found specifically and separately against Holloway upon each of them.

Transcript of Record, page 26.

In the second paragraph of their assignment of errors, filed with the petition for writ of error by Holloway's counsel, and appearing on page 2 of the transcript of record, the counsel aver error by the Oklahoma Supreme Court "in holding that it was not an abuse of discretion for the lower

court to submit special findings to the jury with reference to fraudulent disposition of property, there being no evidence of such fraudulent disposition of property offered on the trial of the case below and none contained in the record."

In reply to this, we beg to state that the testimony of Bradley, found in transcript of record, page 32, 33 and 34, very clearly shows that Mr. Holloway intended to speedily dispose of his property by forced sales, if necessary,—that he did not intend to pay defendants-in-error,—that he did not intend to secure them in any way,—that he would not even execute his notes for the debt,—that he intended to dispose of his stock and then leave Oklahoma and return to Fort Worth, that he would turn over some incumbered lands in Kansas and elsewhere in payment of the debt, and would do nothing else.

This ground of attachment was that Holloway was *about to dispose of his property* with the fraudulent intent to cheat, hinder and delay his creditors. When a merchant owes an account of over $5,000 for over six months, as in Holloway's case, for goods then in his store, or previously disposed of, and declines to pay, or even to fix a date when he will pay at least a part of his debt, and then talks about reducing his stock by forced sales, etc., it looks very much as if he proposed to beat his creditors,—to defraud them.

The jury heard Holloway testify and they heard Bradley's deposition read, and they had no difficulty in reaching the conclusion that Holloway proposed to defraud his creditors as charged in the affidavit.

It is unnecessary to cite authorities upon this point, for it is too late, in any event, for Holloways's counsel to raise a question of error upon the point, even if the Court had committed error. *No objections were made by Holloway's counsel to the action of the lower court it submitting the question of Holloway's proposed fraudulent disposition of property to the jury.*

Nor were any exceptions saved by Holloway's counsel to the action of the Court in submitting such question to the jury.

Transcript of Record, pages 98, 99.

It is true that Holloway (defendant in lower court) *excepted generally* to the giving of all the instructions, but such general exceptions *cannot be tortured into an exception to the special questions.*

And we propose to show hereafter by the record that *no exceptions whatever to either the special questions or the instructions of the lower court, were properly saved by Holloway or his his counsel*; and that it is too late now for them to complain of the instructions.

In the first paragraph in their "assignment of errors" filed with the petition for writ of error by Holloway's counsel appearing on page 1 of the transcript of record, the counsel aver "That the Oklahoma Supreme Court found that the lower court erred in it its instructions numbered eight and eleven, and that the Supreme Court erred in holding such instructions to be harmless by reason of the fact that there was an allegation of fraudulent disposition of property in the affidavit for attachment, which was sufficient to support the judgment of the court."

In reply to the above, we have to say that the Supreme Court of Oklahoma *did not find said instructions numbered eight and eleven were erroneous.*

The most that can be said in favor of the claim or assertion is that the Oklahoma Supreme Court expressed itself as "not certain" whether the lower court had stated the law correctly or not.

Transcript of Record, (opinion), page 109.

The Oklahoma Supreme Court expressly declared that, for reasons given, it did not deem it necessary to pass upon the question of the correctness or incorrectness of those instructions.

Transcript of Record, page 109.

And notwithstanding the expressed doubt of the Oklahoma Supreme Court as the correctness of the instructions, eight and eleven, we submit that the instructions taken together correctly state the law.

Work's Indiana Practice, Vol. 1, Secs. 781 to 784.
Burgett vs. Burgett, 43 Ind. 78.
Rollins vs. The State, 62 Ind. 46.
Sullivan vs. State, 52 Ind. 309.
Work's Indiana Practice, Vol. 2, Sec. 1225, p. 195.
Story on Conflict Laws, Sec, 41.
Somerville vs. Somerville, 5 Vesey, 787.
Harvard vs, Gore, 5 Pick. 370.
Wharton's Conflict of Laws, Sec. 55.
Adams vs. Evans. 19 Kans. 176.

In the last case above cited, Justice Brewer, speaking for the Court, says that "in order to accomplish a change of residence, there must be not only the *intention to change*, but the fact of removal. *Neither is sufficient without the other.*"

The testimony of J. H. Bradley, upon which the jury doubtless fully relied, shows clearly *that Holloway was not and did not intend to become a resident of Oklahoma at the time of the beginning of the suit and levy of the attachment.*

Bradley testifies that he asked Holloway "If he had made the change" from Fort Worth, Texas, to Oklahoma

City, "with the intention of making Oklahoma City his permanent home." That Holloway replied: "*No; it was his intention to dispose of all or as large a portion of his stock as he could and then return to Fort Worth, and thought he would go into the millinery business there*; that there was more money in that than in general merchandising."

Bradley continues: "I told him that I noticed his awning sign still hanging at Fort Worth, and he (Holloway) said yes, but that he would never return to the old store as the location was poor. I then said to him (meaning Holloway): This move, then, is an experiment, and you still regard Fort Worth as your home? And he said 'Yes'."

Transcript of Record, page 32.

Holloway's own testimony, while contradicting Bradley's, shows that he had, at least prior to bringing his stock of merchandise to Oklahoma, a fixed residence at Fort Worth, Texas. This being the case, Fort Worth, Texas, remains and continues to be his residence, within the meaning of the attachment law, until it is clearly shown to have been abandoned.

"The residence of a man having a family which he maintains, is *prima facie*, where that family dwells. A man's acts and conduct are more to be considered in determining the question of a change of residence than any mere declaration of intent; and when the question of residence or nonresidence is doubtful, the question should be so determined as will best secure the rights of creditors and others having dealings with such party."

Keith vs. Stetter, 25 Kans. 103.

We respectfully submit that the criticisms made by the Oklahoma Supreme Court upon the instructions of the

lower court upon the question of residence or non-residence of Holloway are not well founded.

In the case last cited, Judge Brewer says:

"We find it laid down in all authorities that an original domicile, whether of birth or otherwise if lonce fixed clings closely, and we conceive that it can never be changed by the mere intent of the party. The act must accompany and verify the intent. As the homely proverb asserts; 'Actions speaks louder than words,' actions must corroborate and confirm the words. The fact and the intent must concur. (Hart vs. Horn, 4 Kas. 239.)

"Doubtless residence and domicile are not absolutely synonymous terms, but evidently from the facts of that case domicile was used in the sense and as the equivalent of resi. dence. And in so far as there may be any distinction between the two terms, it is not a distinction affecting the rule as stated,

"Defendant's residence confessedly was fixed and established for many years in New York. This, while his business was carried on in Atchison. * * * * Defendant's family dwelt in New York; they were established there. They had never moved."

We quote further: "When a man voluntarily places himself in a position where all that is visible and tangible in his life is consistent with either residence or non-residence, the actual fact as to which, depends solely upon his own intent, and there is that is his business transactions which is strongly indicative of fraud, it in the duty of the Court to so hold as will best secure and protect the rights of creditors and others having dealings with such party. *Whenever the issue comes squarely between a party's secret purpose and the security of creditors, the latter should control.*"

Keith vs. Stetter, 25 Kas. 103, 104, 105.

In comparison with the strong and vigorous language of Judge Brewer above quoted, we cannot forbear to express the opinion that the eighth and eleventh instructions of the lower court, in the case at bar, are quite modest and moderate, and that the rule is correctly stated therein.

No one, who has had frequent occassion to examine this question of residence and non-residence in attachment, is unfamiliar with the fact that there has been a great deal of hair splitting and considerable diversity of opinion among the courts of the country, and particularly among the Judges and courts of the Western States, about the matter.

But we submit that the rule was fairly stated by Judge Brewer in *Keith vs. Stetter*, and that the lower court, in its instructions in the case at bar, did not misstate the law.

In the third paragraph in the "assignment of errors" filed with the petition in error (Transcript of Record, page 1.), Counsel for Holloway insist that the Oklahoma Supreme Court erred "in holding and affirming the judgment of the Court below," in spite of the fact that the lower court erred in giving the 12th instruction, to-wit:

"You need not be unanimous in determining what your verdict shall be; nine of you can determine upon a verdict."

The Supreme Court of the United States has squarely passed upon a similar instruction and upon a similar territorial statute upon which the instruction is based in a recent similar case, and has held that such a law is unconstitutional, and that a verdict rendered by a less number of jurors than the entire panel of twelve, cannot be permitted to stand, under proper objection and exception by the party against who such verdict is rendered.

Amer. Pub. Co. vs. Fisher, 166 U. S. 464.

But, no matter how erroneous the 12th instruction was and is,—no matter what the Court may think of it as a

legal proposition, we submit that plaintiff-in-error cannot now avail himself of such error at this time.

No exception was saved in the court below by plaintiff-in-error, as to the 12th instruction, neither did the motion for new trial, filed by plaintiff-in-error in the lower court, assign said 12th instruction as error, or as ground for a new trial of said cause.

Transcript of Record, pages 27, 28.

In plaintiff-in-error's said motion for a new trial, he assigned as grounds for such new trial pretty nearly everything, evidently, that his counsel could think of, except that he did not assign error in the 12th instruction, Evidently, Holloway and his counsel did not think, at the time the instructions were given, nor later on on the following day when they filed the motion for new trial, that this 12th instruction was erroneous.

The Supreme Court of Oklahoma, in its final opinion in the case, holds said 12th instruction to be erroneous, and then that court adds:

"But no exception was properly taken to it at the time it was given, and the record fails to show that the jury was polled or that the verdict was returned by a less number than twelve jurors. We cannot therefore, consider the objection."

Transcript of Record page 109.

Certainly the plaintiff-in-error, in not excepting to the in-instruction at the time it was given, nor should be thereafter, in his motion for new trial, assigning it as error, must be held to have acquiesced in that instruction; and if the instruction was erroneous, the plaintiff-in-error, by his failure to except thereto, or assign it as error in his motion for new trial,

must be held to have waived such error, and cannot now be permitted to assign such instruction as erroneous.

And the further fact that plaintiff-in-error did not ask to have the jury polled also shows that he acquiesced in this 12th instruction, or else, that he knew the verdict was unanimous, and that a poll would only serve to more definitely establish the fact.

In behalf of the defendants-in-error, we desire to ask the particular attention of the Court to all the alleged exceptions to the instructions of the Court and to the refusal of the Court to give instructions as requested by the plaintiff-in-error claimed to have been taken and saved by plaintiff-in-error in the trial of this cause in the lower court, *and especially to the manner in which the record shows they were taken.*

Transcript of Record, pages 99, 100.

We respectfully submit that such exceptions were not taken and saved, as required by the statute (Civil Code of Indiana) then adopted and in force in Oklahoma Territory.

Oklahoma Statutes (1890), page 842, Secs. 4564, 4568.

The sixth paragraph of section 4564 is as follows:

"When either party asks special instructions to be given to the jury, the Court shall either give instructions as requested, or positively refuse to do so; or, give the instructions with a modification, in such manner that it shall distinctly appear what instructions were given, in whole or in part, and, in like manner those refused, so that either party may except to the instructions as asked for, or as modified, or to the modification. All instructions given by the Court must be signed by the judge, and filed together with those

asked for by the parties, as a part of the record. The instructions shall not be entered at large on the final record, unless either party may wish to remove the cause to a district court."

Section 4565 is as follows:

(4565) 19. "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exception; but it shall be sufficient to write on the margin or at the close of such instruction, 'refused or excepted to,' or 'given and excepted to,' which memorandum shall be signed by the judge, and dated."

This statute of 1890, which was the law in force in Oklahoma Territory when this cause was tried is identical with the Indiana Civil Code, that entire code having been adopted by the territorial legislature, and which went into effect in Oklahoma Territory on the 25th day of December, 1890.

The decisions of the Supreme Court of Indiana, prior to the Oklahoma enactment, upon the matter and proper manner of taking exceptions, to be made available in an appellate court, are controlling, according to a well known rule of construction.

The exceptions can only be saved in the manner pointed out by the statute.

Newby vs. Warren, 24 Ind. 161.
Krock vs. Wolf, 39 Ind. 88.

It is necessary that the exceptions and the assignments of error based thereon, should indicate each instruction separately, which is alleged to be erroneous. And where instructions given to a court by a jury consist of several distinct propositions, *a general exception to the instructions is unavailing, if any one of them is correct.*

Elliot vs. Woodward, 18 *Ind.* 183.

Garrigus vs. Burnett, 9 *Ind.* 528.
Jolly vs. Terre Haute Bridge Co., 9 *Ind.* 471.
Murray vs. Fry, 6 *Ind.* 371.
Sherlock vs. First Nat. Bank, 13 *Ind.* 73.
Olds vs. Deckman, 98 *Ind.* 162.
Short vs. Stutsman, 81 *Ind.* 115.

In conclusion, counsel for defendants-in-error beg to say that the transcript of record and bill of exceptions in this case is in such a jumbled condition that it has been almost impossible for them to discover either the proper beginning or end of it.

We were not the attorneys who represented defendants-in-error in the trial of this cause in the lower court.

Neither have we been favored by plaintiff-in-error or his counsel with a copy of their brief, either in this or in the Supreme Court of Oklahoma.

We desire finally to call the attention of the Court to the fact that there is nothing in the record to show that the original bill of exceptions in the case was presented to the judge of the lower court for allowance during the term of the court at which the cause was tried, nor is there anything in the record to indicate that it was allowed or signed by the trial judge during such term.

The transcript of record (see page 102) shows the following:

"And the defendant now tenders this his bill of exceptions, and prays that the same may be signed, sealed and made a part of the record; which is done this 25th day of June, 1892."

Below this appears the following:

"December 25th, 1892. John G. Clark, Judge."

This was manifestly long after and beyond the term, and there is nothing in the record to show the cause for such delay.

In fact, it appears from the transcript that there were two bills of exceptions, one beginning on page 21 of the transcript and ending on page 90 of said transcript,—the other beginning on page 94 and ending on page 102 of the transcript. How it happens that each of them recites that it was presented, signed and sealed on the 25th day of June, 1892, and yet does not appear to have been actually signed by the trial judge until the 25th day of December, thereafter, we are at a loss to determine.

Doubtless the distinguished counsel for plaintiff-in-error could explain this satisfactorily, at least to themselves.

It would seem, however, that, from the nature of the *praecipe* filed by Holloway's counsel in the lower court (*see transcript page* 91,) that the bill of exceptions was never, in fact, completed until after the 26th day of January, 1893, the date of such *praecipe*, and that, consequently, it could not have been signed by the trial judge until afterwards.

It is certainly a much mixed and very uncertain record.

The Supreme Court of Oklahoma, in its final decision of the case, upon the rehearing, calls attention to the fact that the "original bill of exceptions in that court, contained none of the 'evidence of the witnesses,' but there appeared to be a second or substituted bill of exceptions containing all the evidence."

Transcript of Record, page 108.

And the Supreme Court of Oklahoma adds to the above statement that, "*as it will make no difference in the final conclusion reached, we will consider the bill of exceptions containing the transcript of the entire proceedings.*"

Transcript of Record, page 108.

This, on the part of the Court, was very liberal,—to plaintiff-in-error,—especially as the language of the Court seems to indicate that this larger bill of exceptions had been *substituted* in that Court without leave of the Court having been obtained, and, so far as appears, without the knowledge of defendants-in-error.

It would seem to us that the appeal of plaintiff-in-error should have been dismissed by that Court for uncertainty in the record presented by him for the consideration of the Court.

Respectfully submitted,

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HOLLOWAY *v.* DUNHAM.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 247. Argued May 4, 1898. — Decided May 23, 1898.

On an appeal from the judgment of the Supreme Court of a Territory, the findings of fact are conclusive upon this court.

One general exception to thirteen different instructions cannot be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct.

THIS action was brought in a district court of the Territory of Oklahoma to recover the value of certain goods sold and delivered by the plaintiffs (defendants in error here) to the defendant below, amounting to the sum of $5004.58, the sales having been made between the 1st of November, 1890, and the 10th of March, 1891, and the defendant at the time of the sales being a resident of Fort Worth in the State of Texas. At the time of the commencement of the action plaintiffs also commenced attachment proceedings against the defendant on the ground that he was at that time a non-resident of the Territory of Oklahoma, and also on the ground that he was about to sell, convey and otherwise dispose of his property subject to execution, with a fraudulent intent to cheat, hinder and delay his creditors.

The defendant filed an answer, denying the plaintiffs' complaint, and also one denying each and every material allegation contained in the plaintiffs' petition and affidavits for an attachment.

Counsel for Parties.

Under the practice in Oklahoma there were two issues thus made: one in regard to the existence and amount of defendant's indebtedness to the plaintiffs, and the other as to the facts upon which the attachment could be sustained. These two separate issues came on for trial on the 16th of June, 1892, before the district court and a jury, and after the evidence was in the court submitted to the jury the two issues, and directed a separate verdict to be returned in regard to each issue. The jury returned the following verdicts:

"We, the jury, duly empanelled and sworn in the above case, find for the plaintiff on the attachment issue.

"EUGENE WALKER, *Foreman.*"

"We, the jury, duly empanelled and sworn in the above-entitled case, find for the plaintiffs and assess their damages at $5434.61.

"EUGENE WALKER, *Foreman.*"

At the request of the defendant the court also submitted to the jury the following questions in writing:

(1) "Was J. R. Holloway, on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors?"

(2) "Was J. R. Holloway, on the 31st day of October, 1891, a non-resident of Oklahoma Territory?"

The jury returned an affirmative answer to each question. Judgment was entered for the amount of the verdict.

The defendant appealed to the Supreme Court of the Territory where the judgment was affirmed, and thereupon he obtained a writ of error from this court, and the record is now here for review.

Mr. Fred Beall for plaintiff in error. *Mr. Amos Green* and *Mr. C. M. Green* were on his brief.

Mr. Selwyn Douglas for defendants in error. *Mr. McGregor*

Douglas, *Mr. W. W. Dudley* and *Mr. P. T. Michener* were on his brief.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

This is a very confused record. There would seem to be two bills of exceptions, one containing the evidence and the other reciting certain exceptions, but containing no part of the evidence taken upon the trial. Both seem to have been signed by the judge who tried the case, while neither purports to have been signed by him until months subsequent to the day of trial.

The bill of exceptions containing the evidence is the first bill set forth in the record, and the other bill follows it. It is not material here which bill may be regarded as the regular one, because on an appeal from the Supreme Court of a Territory we cannot examine the evidence as to its weight or sufficiency, and the findings of fact are conclusive upon this court. *Harrison* v. *Perea*, 168 U. S. 311, and cases cited.

There are left only the exceptions to rulings on the admission or rejection of evidence and those taken to the instructions of the court to the jury. The former are not particularly urged, and the latter are substantially confined to two. They arise upon the instructions of the court to the jury in regard to what is sufficient proof of non-residence, and also as to the number of the jury necessary to agree upon a verdict.

The jury found for the plaintiffs on the attachment issue, and also for the plaintiffs in the main action, and assessed their damages at $5434.61. In addition to that the jury found that the defendant on the 31st of October, 1891, was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors, and also that on the 31st day of October, 1891, he was a non-resident of Oklahoma Territory.

Without at this moment considering whether the exceptions taken to the charge of the judge were sufficiently and

properly taken, we think it is not material now to inquire as to the correctness of the charge of the court in relation to the question of defendant's non-residence. If he were a non-resident when the attachment was issued it could be sustained on that ground. But it could also be sustained if at the time it was issued the defendant was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors. So there were two facts entirely separate and distinct from each other, either of which being found to exist would justify and support the attachment.

The jury having found that the defendant at the time the attachment was issued did intend to convey his property, and thus cheat his creditors, that fact is conclusive upon this court, and, being in itself sufficient to uphold the attachment, without reference to the other fact of the defendant's non-residence, a complete answer is furnished to any alleged error in the instruction of the court as to what constitutes a non-resident.

Whether the court erred in charging the law in relation to non-residence is therefore immaterial. There is no such connection between the two grounds upon either of which the attachment could be supported, that an error in the charge of the court in regard to one can be said to affect the other, and thus furnish cause for a new trial.

The other error complained of relates to the instruction of the court that the jury need not be unanimous in their verdict, and that nine could determine it.

The record does not show that the verdict was returned by a less number than twelve jurors nor does the statute require the verdict to be signed by all the jurors. At the time when the verdict was rendered the jury was not polled. It does not therefore affirmatively appear that this verdict was a verdict of less than twelve jurors. If, however, the instruction to the jury had been properly excepted to, the judgment would have to be reversed under our ruling in *American Publishing Company* v. *Fisher*, 166 U. S. 464, and *Springville* v. *Thomas*, 166 U. S. 707. We are of opinion, however, that no proper and

sufficient exception was taken by the defendant to the instruction of the judge to the jury on this question.

The record shows that the court gave some thirteen different instructions to the jury, the thirteenth being the one relating to the number necessary to find a verdict. All of the instructions are set forth at length. Many of them contain more than one proposition of law or fact. At the end of the instructions is the signature of the judge. Following the signature the record contains this further statement:

"The questions hereto attached you will answer in writing, after each question, the word 'yes' or 'no.' You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

"Your foreman will sign each of the verdicts and also this special verdict when you are agreed.

"JOHN G. CLARK, *Judge*."

Then follow "the questions hereto attached," which were the special questions submitted to the jury and already mentioned, to which affirmative answers were made and signed by the foreman. Then follows this general statement:

"To the giving of which instructions and each of them the defendant at the time excepted."

On the same day that the verdict was rendered the defendant moved for a new trial on the grounds therein stated. The grounds are mentioned in great detail.

No mention is made of the thirteenth instruction to the jury, and it is nowhere alleged as ground for a new trial that there was any error in stating to the jury that nine of their number might find a verdict.

The statement in the record in regard to the manner in which the defendant took exceptions to the charge of the judge leaves the fact quite plain that those exceptions were taken generally and in a lump, and were not in reality taken separately or applied specifically to any particular instructions. It was a general statement that the whole charge of the judge was specifically excepted to. No specifications

were given, nothing was said in the way of calling the attention of the judge to any particular portions of his charge which the defendant objected to. When we look at the instructions contained in these various paragraphs, we see that in many of them there are two or more different propositions of law, and that a general exception taken to any of such paragraphs would be insufficient if one of the several propositions were correct. Should one general exception to thirteen different instructions be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct? We think not. The wholesale manner of taking exceptions is unfair, both to the judge and the opposite party. After a judge has given a long charge to the jury, consisting of many different propositions of law and fact involved in the trial, a general exception noted at the end of the charge to each proposition separately of law or fact announced therein is not sufficient if any proposition of law contained in the charge is correct. Those propositions in regard to the correctness of which there is a real controversy should be at least called to the attention of the judge, so that if he thought it proper he might correct, modify or explain them. It is evident the defendant's counsel had no reference in his exceptions to the charge, to many of the propositions therein contained, for they were favorable to the defendant. And it is equally plain that he had in fact no reference to the instructions as to the number necessary to find a verdict. This is shown by the motion for a new trial and the grounds therein mentioned. It would not conduce to the fair administration of justice to permit such an exception to be regarded as sufficient to raise the question herein sought to be reviewed.

Some other questions were made in the brief of the counsel for plaintiff in error, all of which we have carefully examined, but do not find any error which would lead to a reversal, and the judgment must therefore be

Affirmed.

Mr. Justice Brewer dissented.